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(1)

No. _____

IN THE

Supreme Court of the United States

PATRICIA KONARSKI, ET AL.,

Petitioners,

-vs-

CITY OF TUCSON, ET AL.,

Respondents.

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FRANK KONARSKI, ET AL.,

Petitioners,

-vs-

MARY JEAN RACITI, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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He took our money and deceived us, and passed away.

Others and we strongly believe that some individuals of the City of Tucson, through their bad influence—discrimination, prejudice, hate crimes, frames, extortion, etc.—caused some of the attorneys listed above to take our money and deceive us. That's why we are appealing to the Supreme Court.

QUESTIONS PRESENTED

1. Whether the Code of Federal Regulations affords Petitioners and those similarly situated due process protections, including a suspension-cause hearing, particularly in consideration of 24 C.F.R. 24.610, et seq., as such regulations relate to the governance of the federal Section 8 Housing program?

2. Whether an extraordinarily methodical and systematic clandestine public corruption scheme, as recently revealed by government whistleblowers, aimed at causing multi-faceted harm and destroying Petitioners—a family and their interstate commerce business—should be considered as part of what is today's "certain instances" that "'are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of *res judicata*..."?

PARTIES TO THE PROCEEDING

In accordance with Rule 14.1, the following list below identifies the parties represented here.

In reference to *Patricia Konarski, et al., v. City of Tucson, et al.* ("Section 8 Case"), Petitioners here and in the consolidated Ninth Circuit Court of Appeals are Patricia Konarski, John F. Konarski and Frank Edward Konarski (Jr.).

Respondents are the City of Tucson; Julianne Hughes, City of Tucson Assistant Attorney; Emily Nottingham, City of Tucson Community Services Director; and Peggy Morales, City of Tucson Housing Administrator.

There are no corporations of which to report per Rule 29.6.

In reference to *Frank Konarski, et al., v. Mary Jean Raciti, et al.* ("Whistleblower Case"), Petitioners here and in the consolidated Ninth Circuit Court of Appeals are Frank J. Konarski and Gabriela Konarski, individually, as husband and wife, and as owners of FGPJ Apartments & Development (a dba); Patricia Konarski, a single woman and as an owner of FGPJ Apartments & Development (a dba); John F. Konarski, a single man and as an owner of FGPJ Apartments & Development (a dba); and Frank E. Konarski, a single man and as an owner of FGPJ Apartments & Development (a dba).

Respondents are Mary Jean (AKA, "MJ") Raciti, as a City of Tucson senior assistant city attorney and, individually; Julianne K. Hughes, as a City of Tucson senior assistant city attorney, individual capacity, and in her marital community and interest with Graeme Hughes; Viola Romero-Wright, as a City of Tucson senior assistant city

attorney and individually, in her marital community and interest with Robert Halsey Wright; William F. Mills, as a City of Tucson senior assistant city attorney, and individually in his marital community and interest with Edna Gayle Eskay; Cecilia C. Cruz as the City of Tucson Department of Neighborhood Resources Manager and Head of Housing Complaint Inspections, individual capacity, and in her marital community and interest with Salomon R. Baldenegro; Richard (AKA, "Rick") Saldate, as the City of Tucson Department of Neighborhood Resources Supervisory Inspector, individual capacity, and in his marital community and interest with Inez Saldate; Emily Nottingham, as the City of Tucson Community Services Department Director, and individually, with her marital community and interest with John Doe; Michael Spriesterbach, as a City of Tucson senior assistant attorney and individually, in his marital community and interest with Jane Doe; Paul M. Swift, as the City of Tucson Department of Neighborhood Resources Director, and individually with his marital community and interest with Anna C. Swift; Peggy Morales, as the City of Tucson Section 8 Housing Administrator, and individually in her marital community and interest with John Doe; Raymond F. Camacho in his official capacity as a City of Tucson Department of Neighborhood Resources Inspector, individual capacity, and in his marital community and interest with Brenda O. Camacho; Martin Romero, as a City of Tucson Department of Neighborhood Resources Inspector, and individually in his marital community and interest with Jane Doe; City of Tucson, a body politic; XYZ Corporations 1-20; ABC Partnerships 1-20; and Does 1-20.

With regard to corporate Respondents, XYZ Corporations 1-20, these were fictitiously named since their identities were not known at the time of the filing of the Whistleblower Case, and have yet to be determined.

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Petitioners respectfully petition for a writ of certiorari to review the consolidated Section 8 Case and Whistleblower Case judgment of the Ninth Circuit Court of Appeals ("Court of Appeals") in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. 1-4) is reported at 2008 U.S. App. LEXIS 17897 (9th Cir. 2008). The order of the Court of Appeals, dated October 2, 2008 (App. 20-21), denying Petitioners' petition for panel rehearing and petition for en banc review.

The order of the District Court for Arizona ("District Court") (App. 5-14), dismissing the Section 8 Case, filed September 29, 2006.

The order of the District Court, dismissing the Whistleblower Case, filed May 2, 2007 (App. 15-19).

JURISDICTION

Upon having consolidated both *Patricia Konarski, et al., v. City of Tucson, et al.* ("Section 8 Case") and *Frank Konarski, et al., v. Mary Jean Raciti, et al.* ("Whistleblower Case"), and, correspondingly, held a consolidated oral hearing on August 13, 2008, the Court of Appeals filed its Opinion on August 18, 2008, denying Petitioners the appellate relief they sought under 28 U.S.C. § 1291. App. 1-4.

On September 2, 2008, Petitioners timely filed a Petition for Panel Rehearing and En Banc Review.

On October 2, 2008, the Court of Appeals filed its Order, denying both the petition for panel

rehearing and petition for en banc review. App. 20-21.

On January 7, 2009, the Clerk of this Court informed Petitioners to perfect their petition for writ certiorari.

Under 28 U.S.C. § 1254(1), Petitioners now timely submit this instant petition for writ of certiorari, having originally paid the docket fee on December 31, 2008.

CODE OF FEDERAL REGULATIONS INVOLVED

The relevant Code of Federal Regulations is set forth in Appendix E-G, *infra*.

STATEMENT OF THE SECTION 8 CASE

The Code of Federal Regulations exists to regulate various federal programs, including, in particular, the federal Section 8 Housing program that was established under the U.S. Housing Act of 1937 (42 U.S.C. § 1437). These federal regulations, particularly 24 C.F.R. 24.610, et seq., cover every aspect of the Section 8 Housing program, from the general administration of the program to the specific matter of regulating the suspensions of rental property owners from participation in such a federal housing program, the latter of which is the crux of the Section 8 Case petitioned for review to this Court.

24 C.F.R. 24.760 requires a hearing to be held, among other procedural processes to take place, for a property owner who is suspended for more than 18 months from the program. As such, courts of

different circuits across the nation have determined that with such federal regulations come due process protections; however, the Court of Appeals has disagreed in the Section 8 Case.

Specifically, the Court of Appeals affirmed the dismissal of the Section 8 Case of Petitioners Patricia, John F. and Frank E. Konarski by relying on a legal ruling of another case—i.e., there is no independent right to participate in the Section 8 Housing program—as a basis upon which to then arbitrarily determine, in contravention of the jurisprudence of other circuit courts across the nation, that the Code of Federal Regulations, including particularly 24 C.F.R. 24.610, et seq., as it relates to the Section 8 Housing program, does not afford such Petitioners or others similarly seeking participation in a federally regulated program any due process protections, including a suspension-cause hearing.

Petitioners Patricia, John F. and Frank E. Konarski have argued that whether they have a "right" to Section 8 or not does not have any relevance as to whether the Code of Federal Regulations applies to them.

A. Case Facts

Petitioners Patricia, John F. and Frank E. Konarski filed their instant Section 8 Case in 2005 against City Respondents in the capacity that such Respondents acted as the local public housing authority of the federal Section 8 Housing program when, after such Petitioners first became property owners in 2003, City Respondents barred them for more than 18 months from renting to prospective Section 8 tenants who desired to live in their housing, barring them without a suspension-cause

hearing and other procedural considerations accorded property owners under 24 C.F.R. 24.610, et seq., including specifically 24 C.F.R. 24.760.

In referencing a 2001 Title VII employment discrimination action that Frank J. Konarski (*Sr.*), through an attorney, immediately brought forth, without first waiting for his own suspension to surpass 18 months, to challenge his own suspension effected through a March 2001 decision to withhold him from renting his apartments to prospective Section 8 tenants, even though, to this day, he and his wife, Gabriela, have been qualified to rent to an existing Section 8 tenant for about the past 15 years, and the process of renting to new Section 8 tenants is the same as that of the lease renewal process of this existing, 15-year-and-going Section 8 tenancy[1]—a

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[1] Without any trial, the Court of Appeals made an erroneous factual finding as to the 2001 District Court matter, and that was that Frank J. Konarski "had one or more disputes that apparently had racial overtones with tenants" that led to his not being able to rent to new Section 8 tenants. Petitioners nor was their then-counsel under the impression that the Court of Appeals would undertake the function of making such an unproven allegation a factual determination at the appellate level without a trial, altogether of which would nevertheless have no relevance to the three Konarskis—Patricia, John, and Frank E.—now pursuing the instant Section 8 Case as property owners since 2003. However, in the interests of accuracy—if the Court of Appeals would maintain the position of trying this issue—Petitioners offered to furnish to the Court of Appeals City e-mails, among other evidence, that uncover the City of Tucson's Section 8 administrator's premeditated intention of disallowing Frank J. Konarski from renting to new Section 8 tenants: "What I don't want to do is to take an administrative action to bar him [Frank J.], and then not have support legally to see this through to a positive resolution for the City. He has 'won' one case against the City, and we dare not let him gain

matter in which it was determined Section 8 did not create an employer-employee relationship and, in any event, a matter in which Petitioners Patricia, John, and Frank E. Konarski did not appear as landlords or those with any property interest—what the District Court and Court of Appeals found relevant from such a case to apply to the instant Section 8 Case was that property owners cannot claim an independent right to participate in the Section 8 Housing program. App. 3; *see* App. 12.

However, neither the District Court nor did the Court of Appeals ever cite to any authority suggesting that this lack of any "right" to participate in Section 8 relieves City Respondents from having to follow the Code of Federal Regulations as it pertains to its responsibility to fairly administer the federally funded Section 8 program to ***all*** property owners within City Respondents' jurisdiction.

In fact, without citing to any authority, after oral argument on August 13, 2008, the Court of Appeals held that "[Petitioners Patricia, John F. and Frank E. Konarski] assert[ed] that they could only be suspended from Section 8 program for 18 months **is <u>dependent</u> upon their having a right to participate in the program...."** App. 4. (Emphasis added.) With its determination that there is no right to participate in the Section 8 Housing program, the Court of Appeals found that Petitioners Patricia, John F. and Frank E. Konarski were not entitled to

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more confidence/arrogance in the legal arena." City attorney Julianne Hughes' said she would "be able to devote more time to trying to find a way to justify the department removing Mr. K[onarski]. from consideration." Thus, "racial overtones" is an offensive, unproven allegation that the Court of Appeals should have removed.

the federally-codified due process protection of their suspension from participation being limited to not more than 18 months without the initiation of due process hearings under 24 C.F.R. 24.760(b).

Petitioners Patricia, John F. and Frank E. Konarski, through their petition for panel rehearing and petition for en banc review filed on September 2, 2008, argued that the latter holding of the Court of Appeals was not only defiant of the Code of Federal Regulations, but also without the support of any authority, and actually in contravention of the jurisprudence of courts of other circuits.

On October 2, 2008, the Court of Appeals declined to rehear its ruling in light of the foregoing.

B. Federal Jurisdiction in the Court of First Instance

The court of original instance, District Court, had jurisdiction under 28 U.S.C. § 1331.

C. Reasons for Granting Petition

I. The Court of Appeals' Opinion Fully Resolved an Issue, Which is Appropriate for Certiorari, and Its Resolution is Inconsistent With Decisions of This Court and Other Circuit Courts

This case presents this Court with a matter of exceptional importance: The division in the interpretation and application of the Code of Federal Regulations that acts as the essential framework of the administration of federal programs—in this case, the Section 8 Housing program, a national program that affects all fifty states.

Despite the clarity of the Code of Federal Regulations, particularly 24 C.F.R. 24.610, et seq., including specifically 24 C.F.R. 24.760, the Court of Appeals has defied such a code as it relates to the

due process protections found therein and, in the process, has rendered a decision that is inconsistent with the jurisprudence of this Court and courts of other circuits.

Specifically, the Court of Appeals' holding—that because "[Petitioners Patricia, John F. and Frank E. Konarski] assert[ed] that they could only be suspended from Section 8 program for 18 months **is dependent upon their having a right to participate in the program...**"—proves not only to be unsupported by the law, but actually in direct conflict with the law of other courts of different circuits and this Court, as the code, itself, speaks of no prerequisite right to participate in the Section 8 program nor has any other court adjudged that one must have a right to such a federal program for the legal protections of the code to take effect. App. 4. (Emphasis added). For example, a court in the Fifth Circuit has actually applied 24 C.F.R. 24.700 to the "due process" found within the Code of Federal Regulations to property owners the government sought to suspend. *See Rogers v. United States,* 187 F. Supp.2d 626, 632 (N.D. Miss. 2001); affirmed by this Court in *Rogers v. United States/Human Urban Dev.*, 58 Fed. Appx. 595 (US 2003) (without published opinion).

In addition to the Fifth Circuit, the United States Court of Appeals for the Sixth Circuit found, in *Buckeye Terminix Co. v. U.S. Dep't of Housing & Urban Dev.*, 900 F.2d 259 *2 (6th Cir. 1990), that a business that did not have a contract with the U.S. Department of Housing and Urban Development or its public housing authorities, but *merely* an "interest in remaining" qualified for participation in a federal housing program, was legally afforded "a right to be

represented by counsel and present all relevant evidence at a hearing" under the 24 C.F.R. 24.700, et seq. Yet, in the case of Petitioners Patricia, John F. and Frank E. Konarski, *sub judice*—in which not only did Petitioners have a business interest in participation in the Section 8 Housing program, but also prospective Section 8 tenants were effectively choosing to use their "free-choice" Section 8 housing vouchers at Petitioners' apartments in selecting them as their landlords, consequently making Petitioners' privilege to participate in the program a right to accept the business they receive—they have been denied all due process protections accorded under 24 C.F.R. 24.700, et seq., including a hearing, to the present day—now approximately seven years, even though "a **prompt** post-deprivation hearing" should have been accorded them at the very least. *Buckeye*, 900 F.2d 259 *13 (Emphasis added.) *See also Housing Study Group v. Kemp*, 739 F. Supp. 633 (D.C. May 16, 1990) (citing *Buckeye, supra*).

This is where the injustice lies: If Section 8 participation is determined by the Section 8 voucher holder, and City Respondents' role is to ensure safe and sanitary living conditions to those qualified under the Section 8 Housing program, where is the government's—in this case City Respondents'—authority to suspend the application of the Code of Federal Regulations as it pertains to any property owner in Tucson or any other locality? Quite bluntly, this authority does not exist.

Put differently, since the Section 8 voucher recipient determines where they live—what housing of a property owner they want, the City Respondents' job is to administer this program by: (1) ensuring that the property is safe and secure; and (2) making

sure that the property owner gets compensated.

To this end, 24 C.F.R. 24.610, et seq., was established to provide a framework for the proper administration of Section 8 housing.

Specifically, 24 C.F.R. 24.760 says that City Respondents cannot bar any property owner for more than 18 months from renting to prospective Section 8 tenants who want to live in that property owner's apartment.

If the Code of Federal Regulations were to only be applied to property owners who have a "right" to Section 8, and in consideration of the Court of Appeals' establishment that no property owner actually has the "right" to Section 8, then, logically, the Code would protect no property holder, rendering such a code impotent as to its regulatory purpose and generally useless as to its existence.

Undeniably, this Section 8 Case of Federal Code Regulations was not an issue before the court in the 2001 Title VII action the Court of Appeals relied upon to find that Petitioners Patricia, John F. and Frank E. Konarski had no due process recourse, having no "right" to the Section 8 Housing program. App. 3. In accordance with *Allen v. McCurry,* 449 U.S. 90, 94 (1980), since Petitioners Patricia, John F. and Frank E. Konarski had no ability to know that the City, at the outset of the Title VII suit, would continue its bar against Frank J. Konarski, and actually apply the bar to them all for more than 18 months, the law would not permit the doctrine of *res judicata* to apply to this situation.

More directly, the *underlining crux of the issue* is this: The Court of Appeals' reliance on whether Petitioners Patricia, John F. and Frank E. Konarski have a "right" to Section 8 or not does not have any

relevance as to whether the Code of Federal Regulations applies to them. There is nothing in the Code that permits City Respondents to treat them the way they did *without* first finding unsafe or unsanitary apartments during apartment-move-in inspections for new Section 8 tenancies; City Respondents have refused to conduct these move-in inspections after numerous prospective Section 8 tenants have applied to rent from them. City Respondents, in effect, have persistently defied, with impunity thus far, their administrative obligations and the fulfillment of following the Code of Federal Regulations.

The Code of Federal Regulations not only applies to those who have "rights" to participate in a government program, but also to those who want to participate in government programs; it is the framework that dictates the way a government agent is to act when dealing with those seeking government contracts. Hence, there is no "dependence" on any "right" that bars application of 24 C.F.R. 24.610, et seq., to any person or entity; this code dictates governmental acts to the public *regardless* of any perceived "right."

Accordingly, no property owner in the United States has the "right" to participate in the Section 8 Housing program, according to the Court of Appeals. Given this legal fact, the property owners *still* have the protections found under 24 C.F.R. 24.610, et seq., otherwise why would there be any reference to a quasi due process procedure found under 24 C.F.R. 24.760?

The real question is not whether Petitioners Patricia, John F. and Frank E. Konarski have the "right" to participate in Section 8—since that has

been decided for all—but rather whether they (and others) have a right to have the protections found under the Code of Federal Regulations apply to them equally as any other property owner who has no right to Section 8 participation either.

In other words, the Court of Appeals provides no cited authority for the premise that just because Petitioners Patricia, John F. and Frank E. Konarski do not have the "right" to participate in Section 8, they have no right to have the protections accorded to all those who want to participate in Section 8 as found in the Code of Federal Regulations.

In summation, the instant Section 8 Case pending is to establish whether the City of Tucson violated the Code of Federal Regulations proscribing the elimination of property owners/landlords for *more* than 18 months. Without a doubt, due process protections being an inherent part of the Code of Federal Regulations that controls the Section 8 Housing program is an issue that could not have been raised nor was it decided by the Court of Appeals' reference to the 2001 Title VII suit of Frank J. Konarski, and it generally remains an issue that is in stark conflict with the jurisprudence of other courts that deserves to be uniformly decided by this Court.

STATEMENT OF THE PUBLIC CORRUPTION WHISTLEBLOWER CASE

The Whistleblower Case involves an extraordinarily methodical and systematic clandestine public corruption scheme, as recently revealed by government whistleblowers, aimed at causing multi-faceted harm and destroying

Petitioners—a family and their interstate commerce business.

While Petitioners believe that the Whistleblower Case does not bear the necessary elements that would cause it to be barred from prosecution on the basis of *res judicata,* given the nature of this case—that Petitioners had only recently discovered concrete facts that these City Respondents had kept secreted away: the conspiracy to use municipal authority to destroy Petitioners' apartment rental business—even if the Court were to find "privity" between City Respondents and the defendants of the previous case against the City of Tucson, denying Petitioners the ability to adequately prosecute these allegations now for action that occurred prior to April 2005, but only recently discovered would be an injustice, one that this Court should take exception to and should consider as part of what is today's certain instances that are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of *res judicata.*

A. Case Facts

The Whistleblower Case encompasses City of Tucson employees of 2002 and on who came forward in 2005 to admit, as whistleblowers, that they were ordered by high-directorate City Respondents to harm Petitioners Frank J., Gabriela, Patricia, John F. and Frank E. Konarski and their business through a systematic and methodical public corruption campaign to run them out of business.

City Respondents had the District Court dismiss the Whistleblower Case on *res judicata,* which the Court of Appeals upheld, despite the maintained fact that the Whistleblower Case did not meet the criteria of *res judicata.*

The crux of the appeal issue before this Court is that even if, *assuming arguendo,* the rigid form of *res judicata* did, in fact, bar the Whistleblower Case, as the District Court and Court of Appeals believed it did, it was not proper for the District Court to have dismissed, and for the Court of Appeals to have affirmed such a dismissal of, the Whistleblower Case instead of allowing it to be remanded to meet the justice-wielding body of a jury because said case arose out of noteworthy egregious injustices Petitioners have suffered as a result of a whistleblower-revealed extraordinarily methodical and systematic public corruption scheme aimed at destroying a family and their business that should be considered as part of what is today's certain instances that are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of *res judicata.* This issue was raised in Petitioners' response to City Respondents' motion to dismiss, at pages 12-13, filed on December 8, 2006, to wit: "In fact, the Supreme Court of the United States held that: '...injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the [doctrine of *res judicata*]...' (*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)) should result in the [Petitioners] being able to maintain their claim against these specific Defendants, for activity just recently discovered." *See also Charter Twp. of Muskegon v. City of Muskegon*, 303 F.3d 755, 762 (6th Cir. 2002). City Respondents had expended, at their disposal, virtually unlimited public funds and resources to secretly protect their personal interests and continue their corruption unhindered until the whistleblowers came to light just recently, for which

Petitioners should not have been penalized.

In spite of the above response and relief sought, the District Court, in its May 2, 2007 order, granted City Respondents' motion to dismiss.

As part of seeking relief from the dismissal order, as an alternative to their appellate arguments, Petitioners still sought the Court of Appeals to depart from the rigid adherence to the doctrine of *res judicata*, given the egregious public corruption that was at the center of the Whistleblower Case, as Petitioners noted in their Opening Brief, at page12, to wit: "Plaintiffs [Petitioners] readily admit that they were substantially the same group that brought forth a claim in 2001, but only one of the defendants [City Respondents] named in 2001 is any one of Defendants [City Respondents] named in the 2006 suit: Adolf Valfre. Hence, there is scant 'privity of parties,' and as a result to this new action, the District Court should not have estopped Plaintiffs [Petitioners] under the doctrine of *res judicata*."

The Court of Appeals' Opinion in the Whistleblower Case never acknowledged the fact that in the cause of action that arose from the incident just prior to 1998—the first suit Petitioners filed after Frank J. Konarski was adjudged by both a trial judge and appellate judge of having been beaten and arrested *without* probable cause—bears no resemblance to the current whistleblower cause of action that occurred in 2002 and thereafter.

Unquestionably, Petitioners sued the City of Tucson in 1998 for a matter that happened just before the time of 1998, and then they sued City Respondents again in 2006 for a matter that happened in 2002 and other whistleblower-revealed tortious pratices thereafter, of which were *discovered*

in 2005 through whistleblowers. In fact, the whistleblowers who had come to commit the transgressions against Petitioners had come to work for City Respondents' main culprit department, the Department of Neighborhood Resources, that was first established in April 2002, four years after the so-called 1998 case and one year after the so-called 2001 case the Court of Appeals erroneously concluded as barring litigation of events transpiring after 2002.

Empirically, it is not legally possible for the District Court nor Court of Appeals to consider a 1998 cause of action of a no-probable-cause "police brutality," and a 2002 cause of action for fabricating bogus charges and other tortious conduct as one in the same for the purpose of *res judicata*; it simply cannot be reconciled that the two are the same action under the same litigation.

Instead of distinguishing the Whistleblower Case apart from the incident just prior to 1998, the Court of Appeals incorrectly implies that it is based "as a result of the incident." App. 2. The Court of Appeals' Opinion mistakenly goes out further on a limb to make an all-inclusive disposition that while the claims of the Whistleblower Case "are not directly controlled by the prior judgment holding that they have no right to participate in the Section 8 program, the claims are barred because they could have been raised in the prior action." *Id.* at 4. Petitioners retort: How could the Whistleblower Case claims be raised in the prior action of 1998 or 2001 if the Whistleblower Case is based on misconduct discovered in 2005 based on a cause of action alleged in 2002, more than four years later than the 1998 cause of action and a year later than the 2001 cause

of action? Reading the Opinion as it is, especially the foregoing excerpts of it, makes one realize that the Court of Appeals erroneously did not appreciate the critical knowledge of what the Whistleblower Case actually entails because nowhere in the 4-page Opinion does the Court of Appeals refer to the post-2001 misconduct.

B. Federal Jurisdiction in the Court of First Instance

The court of original instance, District Court, had jurisdiction under 28 U.S.C. § 1331.

C. Reasons for Granting Petition

I. The Court of Appeals' Opinion Fully Resolved an Issue, Which is Appropriate for Certiorari, and Its Resolution is Inconsistent With Decisions of This Court and Other Circuit Courts

It is in the light of eye-opening, egregious public corruption aimed at destroying Petitioners—a hardworking family and their business livelihood to which they devoted 35 years of their lives—that this Court should consider the Whistleblower Case as one of today's instances in which justice requires that the Court "depart[ ]" from the "rigid adherence to the doctrine of *res judicata*" so that the case can moved forward. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944). The District Court and Court of Appeals failed to provide such relief.

The Whistleblower Case was prompted by and revolves around at least four (4) whistleblowers who became the henchmen of high-directorate officials of the City of Tucson—known herein as City Respondents, who ordered them and others to carry out a systematic and methodical campaign to hurt, harass, and violate the rights of Petitioners and

ultimately attempt to run them out of their interstate commerce business. This includes the following: falsifying police reports and charges in 2002 and the subsequent extortion of money; pursuing frivolous and vexatious requirements of Petitioners to progressively hinder the management and commerce of their business; attempting to deprive Petitioners' use of their property; and utilizing inspectors of the Department of Neighborhood Resources to hinder Petitioners' profession and systematically rob them of their real estate and livelihood. The Court of Appeals' Opinion is devoid of the foregoing description of the nature of this egregious public corruption matter.

The damning transcribed admissions of the whistleblowers' egregious systematic and methodical orders made by high-directorate City Respondents to attack Petitioners (Konarskis) and their business that make up the claims of the Whistleblower Case (and are a part of district court record), provide an alarming glimpse of the systematic and methodical public corruption Petitioners had to endure, including the following:

> Whistleblower: They [city officials] have had logistical meetings to specifically go after who they want. (Court Reporter Transcript of Whistleblower Lee Ray Hanley, April 6, 2005, at 27, lines 11-12; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: What they wanted to do was put them (Konarski) out of business. (Court Reporter Transcript of Whistleblower Robert and Brian Hendricks, May 9, 2005, at 3, lines 17-18; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: These people [city officials] are bad.... I do know he [city official] tried to condemn some property that your dad [Frank J. Konarski] now owns....And his idea was that he was going to take the property. (Court Reporter Transcript of Whistleblower Lee Ray Hanley, April 6, 2005, at 7, line 1, lines 12-14, lines 18-19; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: I used to work for Ceci Cruz and Rick Saldate [city officials], and they would send us out there on occasion to harass them [Konarskis]. (Court Reporter Transcript of Whistleblowers Robert and Brian Hendricks, May

9, 2005, at 3, lines 10-12; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: Rick Saldate and Cecilia Cruz [city officials] are aware that what they're asking for is illegal, but they're also aware that most people won't fight. They go after the poor people first. (Court Reporter Transcript of Whistleblower Lee Ray Hanley, April 6, 2005, at 12, lines 21-24; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: The Konarskis was one of their main targets. (Court Reporter Transcript of Whistleblowers Robert and Brian Hendricks, May 9, 2005, at 4, lines 6-7; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: They just had a personal vendetta against them [Konarski], it

seemed to me.
/..../
I know that Rick and his father [city officials] own a lot of rental properties, maybe they were trying to get it...I just know they had a personal vendetta against the Konarskis. (Court Reporter Transcript of Whistleblowers Robert and Brian Hendricks, May 9, 2005, at 6, lines 1-2 and lines 8-11; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: They [city officials] were forcing me to do things I didn't want. (Court Reporter Transcript of Whistleblowers Robert and Brian Hendricks, May 9, 2005, at 14, lines 23-24; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Interviewer: Okay. Did he [Frank J. Konarski] ever touch you?

Whistleblower: No, he never touched me....
/..../
Whistleblower: I didn't want to pursue any charges, and they chased me

down for a good two weeks. 'You've got to do this. You've got to do this....

/..../

....She [Cecilia Cruz, city official] pushed the hell out of that shit. She even escorted me to the City Attorney's Office. She helped me – she didn't help me – she prepared everything.

/..../

'This is what you've got to tie in. This is what we want to do.' Blah, blah, blah. I felt bad. Then one day, I'm getting a phone call that says, 'Jess, will you drop these charges? We're going to give you 500 bucks.' If I can make this guy go away, and get rid of Ceci, I'll take 50 dollars, I told him. (Court Reporter Transcript of Whistleblower Jess Craig, April 19, 2005, at 13, lines 5-7; at 16, lines 10-12, 20-23; at 17, lines 1-6; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: They [city officials] would go into the computer and they would change—they would change stuff inside the computer.

/..../

...[T]hey would go in there and change our stuff to make it—to benefit their fitting. (Court Reporter Transcript of Whistleblowers Robert and Brian Hendricks, May 9, 2005, at 20, lines 9-11 and 17-18; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Interviewer: Were the Konarskis one of those people on that list?

Whistleblower: The Konarskis were one of those people. I was also told by one of the inspectors that they sat outside one of Mr. Konarski's properties yelling at the person inside that he was a wimp, or a pussy, and that he needed to get out there....(Court Reporter Transcript ofWhistleblower Lee Ray Hanley, April 14, 2005, at 15, lines 12-18; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: They [city officials] wanted to hit Frank harder. Harder. (Court Reporter Transcript of

Whistleblower Jess Craig, April 19, 2005, at 6, lines 20-21; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: You have to write up things, contort, twist. (Court Reporter Transcript of Whistleblower Jess Craig,April 19,2005,at 9, line10; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: I've been telling the [City] lawyers for years. I've been going, you guys are going to get screwed one of these days because what you're doing is not legal. (Court Reporter Transcript of Whistleblower Lee Ray Hanley, April 6, 2005, at 23, line 1, lines 12-15; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

The Whistleblower Case should not be short-circuited to allow the above ugly head of corruption aimed at destroying a family and their interstate commerce

business—Petitioners—to go about its way without the imposition of accountability. Given the above, contrary to the Opinion, "the City of Tucson's decision not to enter into...contracts" is shown as not being the basis of the Whistleblower Case, to say the least. App. 2.

The Whistleblower Case arises out of extraordinary injustices Petitioners had to suffer as a result of egregious misconduct from, ironically, public entities—public officials who were supposed to serve a government structure intended to, if anything, help Petitioners and their business, and certainly not act under the guise of a governmental entity, as they did—having secretive "logistical meetings to specifically go after who they want"—to deliberately attempt to completely destroy Petitioners and rob them of their livelihood for their corrupt motives and gains. Court Reporter Transcript of Whistleblower Lee Ray Hanley, April 6, 2005, at 27, lines 11-12. (Due to its lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.) It would be "manifestly unconscionable" for the corrupt public officials, identified as City Respondents herein, to be able to escape accountability for their gross tortious and criminal actions against Petitioners by this Court's maintaining the rigid *res-judicata* bar merely because City Respondents were able to utilize government resources to conceal their corrupt activities for some time. *Hazel-Atlas Glass Co., supra* (citing *Pickford v. Talbott*, 225 U.S. 651, 657 (1912)).

CONCLUSION

On the basis of the foregoing, it is respectfully urged and prayed for that this Court grant the writ of certiorari herein to United States Court of Appeals for the Ninth Circuit, and that it ultimately reverse the Court of Appeals Opinion and remand both the Section 8 Case and Whistleblower Case back to the District Court for further litigation, with the following opinion, along with any further relief deemed appropriate for the behalf of Petitioners:

In the Section 8 Case, in an effort to unify the diverging legal holdings among the circuits as described above, like any property owner, Petitioners Patricia, John F. and Frank E. Konarski do have the "right" to the protections found in the Code of Federal Regulations independent of a "non-existent" "right" of any property owner to participate in the Section 8 Housing program; the Court of Appeals' reliance that the two be necessarily intertwined is unsupported by any authority.

In keeping with the jurisprudence that "'certain instances...demand a departure' from rigid adherence to the doctrine of *res judicata*," the Whistleblower Case of Petitioners must be permitted to proceed on the path to a jury trial so that it may be tried on its merits in order for justice to prevail. *Hazel-Atlas Glass Co., supra.*

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RESPECTFULLY SIGNED this 3rd day of March 2009.

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He took our money and deceived us, and passed away.

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICIA KONARSKI; et al., Plaintiffs-Appellants, v. CITY OF TUCSON; et al., Defendants-Appellees.	No. 06-17139 D.C. No. CV-04-00260-FRZ MEMORANDUM*

FRANK KONARSKI, Individually as husband, and as owner of FGPJ apartments; et al., Plaintiffs-Appellants, v. MARY JEAN RACITI, as City of Tuscon senior city attorney and individually; et al., Defendants-Appellees.	No. 07-16062 D.C. No. CV-06-00177-RCC

(Filed Aug. 18, 2008)

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Arizona
Frank R. Zapata, District Judge, Presiding

Argued and submitted August 13, 2008**
San Francisco, California

Before: SILER,*** MCKEOWN, and CALLAHAN, Circuit Judges.

Frank Konarski and his children appeal from the district court's dismissals of two of their actions seeking relief from the City of Tucson's decision not to enter into any new contracts with them under Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437, *et seq*. We agree with the district court that the two suits were barred by *res judicata*, and affirm.

Sometime prior to 1998, Frank Konarski had one or more disputes that apparently had racial overtones with tenants of his apartment structure and that led the Tucson Community Service Department to decline to enter into any new Section 8 contracts with him.[1] The Konarskis brought several lawsuits as a result of the incident and the decision not to enter into any new contracts. Most relevant for these

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** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

[1] Because the parties are familiar with the facts and procedural history, we do not restate them here except as necessary to explain our disposition.

appeals was *Konarski v. Gaffney, et al.*, which became District of Arizona Civ. No. 01-503 TUC DCB.[2] In that case, the district court determined that the plaintiffs had "no right to participate in the Section 8 program." The district court's decision was affirmed by the Ninth Circuit. *Konarski v. Valfire,* 67 Fed.Appx. 458 (9th Cir. 2003).

In these appeals, the Konarskis assert that their complaints are not barred by *res judicata* because there is neither privity between the parties nor identity of claims. A subsequent complaint is barred by *res judicata* where there are "(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between the parties." *Hells Canyon Preservation Council v. U.S. Forest Serv.*, 403 F.3d 683, 686 (9th Cir. 2005). All parties agree that there are final judgments in the Konarskis' prior actions.

There is privity in these cases because each current defendant is a government or government employee who is "so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved." *In re Schimmels,* 127 F.3d 875, 881 (9th Cir. 1997); *see also Sunshine Anthracite Coal Co. v. Adkins,* 310

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[2] This lawsuit was filed in the United States District Court for the District of Columbia as Case No. 1:01CV00975, and was subsequently transferred to the United States District Court for Arizona.

U.S. 381, 402-03 (1940) (holding that there is privity between officers of the same government).[3]

Furthermore, to the extent that the Konarskis' current claims are not directly controlled by the prior judgment holding that they have no right to participate in the Section 8 program, the claims are barred because they could have been raised in the prior action. *Allen v. McCurry,* 449 U.S. 90, 94 (1980) (holding that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action"). The Konarskis' assertion that they could only be suspended from the Section 8 program for 18 months is dependent upon their having a right to participate in the program, but that issue has been finally resolved against them.

Finally, we agree with, and reiterate, the district court's warning when it denied defendants' request for sanctions that "[s]hould the Plaintiffs continue to file the same claims, which have been ruled upon by three District Court Judges" – and now at least twice by this court – "the Court will consider sanctions."

For the forgoing reasons, the district court's dismissals of these two actions are **AFFIRMED**.

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[3] Frank Konarski's children, plaintiffs in District Court No. CV-04-00260-FRZ, admit in their brief that they were "a part of the group of plaintiffs that brought forth a claim in 2001."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Patricia Konarski, John F. Konarski and Frank Edward Konarski (Jr.), Plaintiffs, vs. City of Tucson; Julianne Hughes, City of Tucson Assistant Attorney; Emily Nottingham, City of Tucson Community Services Director; Peggy Morales, City of Tucson Housing & Administrator; United States Department of Housing & Urban Development (HUD), Defendants.	No. CV 04-260-TUC-FRZ **ORDER** (Filed Sept. 29, 2006)

Factual and Procedural Background

This action commenced with the filing of the Complaint *pro se* on May 17, 2004, alleging claims for violations of civil rights under Title 42 U.S.C. §§ 1982 and 1988. In response, the City of Tucson Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(b) of the Federal Rules of Civil Procedure, seeking to dismiss this action for failure to state a claim upon which relief can be granted.

The Court issued its Order on September 26, 2005, granting Defendants' Motion to Dismiss without prejudice and further granting Plaintiffs leave to file an amended complaint, finding that Plaintiffs failed to meet the general pleading requirements under Rule 8 of the Federal Rules of Civil Procedure and failed to allege proper standing and jurisdiction. Accordingly, the Court found that Plaintiffs' Complaint failed to allege a claim upon which relief can be granted. The Court also found that Plaintiffs' claims appeared to be barred by *res judicata*.

Plaintiffs filed their amended Complaint on October 26, 2005, alleging four separate causes of action. The first cause of action alleges breach of contract. The second cause of action alleges that Defendants acted in an arbitrary and capricious manner. The third cause of action alleges a violation of the United States Department of Housing and Urban Development ("HUD") regulations governing suspensions. The fourth cause of action alleges that the Secretary of HUD has "violated congressional declaration of national housing policy."

Filed in response to the amended Complaint and before the Court for consideration are Secretary Alphonso Jackson's Motion to Dismiss and a Motion to Dismiss by Defendants City of Tucson and the individually named City of Tucson employee Defendants (hereinafter "City Defendants").

Legal Standard

Defendant Alphonso Jackson, Secretary of the United States Department of Housing and Urban Development (hereinafter "HUD"), and the City Defendants move to dismiss Plaintiffs' amended Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), FED.R.CIV.P.

In reviewing a motion to dismiss a complaint under Rule 12(b)(6), the Court must take all well-pleaded allegations of material fact as true and construe them in the light most favorable to the plaintiff. *Manshardt v. Federal Judicial Qualifications Committee,* 408 F.3d 1154, 1156 (9th Cir.2005) (*citing Gompper v. VISX, Inc.,* 298 F.3d 893, 895 (9th Cir.2002); see also *Zimmerman v. City of Oakland,* 255 F.3d 734, 737 (9th Cir.2001). Dismissal is proper under Rule 12(b)(6) if it appears beyond doubt that the plaintiff can prove no set of facts to support his claims. *Id.* (*citing Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir.2004)).

Based on the foregoing standard, the Court finds dismissal proper under Rule 12(b)(6).

Discussion

I. Secretary Alphonso Jackson's Motion to Dismiss

Defendant Jackson, sued only in his official capacity, moves to dismiss the amended Complaint

against HUD based on the contention that this action involves a dispute between the City of Tucson and the Plaintiffs, and that Plaintiffs have failed to state a claim to show that there was a breach of contract involving HUD; that there was no arbitrary or capricious actions taken by HUD; there was no regulatory violation under 24 C.F.R. § 24.760(b) by HUD, and there is no separate private cause of action against HUD for violation of congressional policy.

HUD's motion provides a thorough analysis of the relevant provisions of 42 U.S.C. § 1437 and the applicable federal regulations promulgated thereunder by which HUD, through its Section 8 program, provides federal funding to help needy families with housing requirements. Section 8 housing is predominantly and generally administered by state and/or local governmental entities referred to as public housing agencies or "PHAs." See 24 C.F.R. § 982.1(a)(1) and (2).

As HUD contends, this action arises out of a long standing dispute between the Plaintiffs and the City of Tucson. The present focus is that Plaintiffs are the new owners of apartments and, as such, the City of Tucson's continued refusal to allow Plaintiffs to participate in the Section 8 program is improper.

HUD argues that Plaintiffs fail to state a claim on its breach of contract claim because there is "nothing in 42 U.S.C. § 1437f(b)(1) or 24 C.F.R. § 982.455 that supports Plaintiffs' contention that there was a 'contractual agreement' between Defendants and

anybody, much less HUD." HUD emphasizes that "Section . . . 1437(b)(1) merely authorizes the Secretary 'to enter into annual contribution contracts with [PHAs] pursuant to which such agencies may enter into contracts to make assistance payments to owners. . . . '" (footnote omitted)[1]

HUD further argues that Plaintiffs' contentions regarding breach of contract are falsely premised on the allegation that they were contractually entitled to procedures set forth in the applicable regulations.

In regard to Plaintiffs' allegations set forth in their second cause of action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, as well as the allegations set forth in Plaintiffs' third and fourth causes of action, HUD argues that such fail to state a claim, because 24 C.F.R. § 760(b) has no application and there is no separate private cause of action under 42 U.S.C. § 1441.

In response, Plaintiffs argue that whether HUD "is not responsible for their PHA's action . . . is a question that needs to be determined at trial" and that "[i]f Plaintiffs can prove that there is a 'master and servant' relationship between HUD and their PHA, then there is little doubt that HUD would be as

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[1] Secretary Alphonso Jackson's Motion to Dismiss, page 5.

liable as their PHA for any 'arbitrary and capricious acts' committed by the PHA." (citation omitted).[2]

Plaintiffs fail, however, to present any authority to support their contentions and interpretation of the statutory and regulatory language relied upon.

II. City of Tucson Defendants' Motion to Dismiss

The City of Tucson Defendants move to dismiss the amended Complaint on the basis Plaintiffs previously litigated the issues raised and there are no set of facts that would entitle them to relief.

The City Defendants argue that Plaintiffs "seek, by way of their complaint, to resurrect the same claim raised by these same plaintiffs in a lawsuit filed against Defendants in May 2001,"[3] and reassert that the issues raised in the present action are barred by the doctrines of *res judicata* and collateral estoppel, based on an August 21, 2002 order by the Honorable David C. Bury, granting summary judgment in favor of the defendants in an action brought by the same Plaintiffs now before the Court.

The previous action alleged violations relating to the administration of Section 8 housing, pursuant to the United States Housing Act of 1937, 42 U.S.C.

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[2] Comprehensive Response to Both Motions to Dismiss, page 2.

[3] Motion to Dismiss, page 2.

§ 1437f and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.* Judge Bury found that Plaintiffs had no property interest to pursue their constitutional claims under the Fifth and Fourteenth Amendments. The court also found that it lacked subject matter jurisdiction over the Title VII claims.

Defendants request that the Court take judicial notice of the record in the underlying action, attaching as exhibits copies of the Court's Order and judgment, and decision of the Court of Appeals for the Ninth Circuit affirming the district court's dismissal. The City Defendants contend that although the allegations of the new complaint differ, the Plaintiffs' demand that the Court order Defendants to reinstate them into the Section 8 program is the same issue that has been litigated in the previous action.

The City Defendants also address each of the causes of action on the merits, setting forth substantiated arguments that there is no breach of contract under 42 U.S.C. § 1437f(b)(1) because there exists no contract between HUD and the Plaintiffs. Defendants further argue that Plaintiffs' reliance on 24 C.F.R. § 24.600 is misplaced.

The City Defendants further support their position that the Public Housing Agency, created pursuant to A.R.S. § 36-1404 is not a federal agency subject to the Administrative Procedure Act, and therefore, Plaintiffs fail to state a claim under their second and third causes of action based on the PHA's decision to no longer contract with the Plaintiffs.

Finally, Defendants argue that Plaintiffs' fourth cause of action presupposes an obligation on the part of the City Defendants to recognize an inherent right to participate in the Section 8 program by the Plaintiffs, which is not established, and that moreover, Plaintiffs have had a full and fair opportunity to litigate this issue, and thus, are now precluded from doing so under the doctrines of judicial and collateral estoppel.

Plaintiffs argue in opposition that the doctrine of *res judicata* does not apply because the claims raised in the present action arise from activity that happened after January 2003, and therefore, "as a matter of course, Plaintiffs could not have previously litigated the issue at the time 01-CV-975 was filed; the issue had not yet become ripe for litigation."[4] Plaintiffs further argue that there can be no claim preclusion, because "Plaintiffs could not see in the future that the Tucson PHA would maintain their sanction for more than 18 months."[5]

Plaintiffs emphasize that under the standard of review, all facts alleged in the amended Complaint must be taken as true, and that Plaintiffs have provided a valid cause of action that needs to be addressed by a competent trier of fact regarding the

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[4] Comprehensive Response to Both Motions to Dismiss, page 6.

[5] Id.

breach of contract claim as well as the claims for violations of federal housing regulations.

III. Analysis

Set forth in the City of Tucson Defendants' Motion to Dismiss is a thorough analysis of *res judicata* and issue preclusion supported by case law.

Secretary Alphonso Jackson's Motion to Dismiss sets forth a thorough analysis and addresses Plaintiffs' causes of action as alleged in the amended Complaint on the merits. The arguments for dismissal are well supported with authority presented.

Plaintiffs oppose the Defendants' motions to dismiss, but do not dispute the legal standards or authority relied upon by the Defendants.

Upon review and consideration of the matters presented, the Court finds that the causes of action raised in the case at bar are precluded by *res judicata*. *See Lanphere Enterprises, Inc. v. Koorknob Enterprises*, 145 Fed. Appx. 589, 590-592 (9th Cir. 2005); *Providence Health Plan v. McDowell*, 385 F.3d 1168, 1173 (9th Cir. 2004); *Littlejohn v. United States*, 321 F.3d 915, 919 (9th Cir. 2003).

Moreover, because it appears beyond doubt that the Plaintiffs can prove no set of facts to support their causes of actions as alleged, and have thus failed to state claims upon which relief can be granted, dismissal of the present action is proper under Rule 12(b)(6). *Adams*, 355 F.3d at 1183.

Based on the foregoing,

IT IS HEREBY ORDERED that Secretary Alphonso Jackson's Motion to Dismiss [Doc. #31] and the Motion to Dismiss [Doc. #32] filed by the City of Tucson Defendants is GRANTED; Judgment shall be entered accordingly.

DATED this 29th day of September, 2006.

/s/ Frank R. Zapata
FRANK R. ZAPATA
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FRANK J. KONARSKI and GABRIELA KONARSKI; et al., Plaintiffs, vs. MARY JEAN RICITI; et al., Defendants.	No. CV 06-177-TUC-RCC **ORDER** (Filed May 2, 2007)

Pending before the Court are the Defendants' Motion to Dismiss (Docket No. 55) and Plaintiffs' Motion for Leave to File Amended Complaint (Docket No. 63). The Defendant's request for Oral Argument is denied. The Court has found the Parties' pleadings to be sufficient for rendering a decision on the Motion to Dismiss. Following a careful review of the Defendants' Motion to Dismiss, the Plaintiff's Response and the Defendant's Reply, the Court will grant the Motion to Dismiss and deny the Plaintiff's Motion for Leave to File an Amended Complaint.

This case was filed on April 7, 2006 and the Defendants filed their Motion to Dismiss on October 19, 2006. The Plaintiff initially alleged a Racketeering claim, a Sherman Antitrust claim, a 42 U.S.C. §1985 claim for conspiracy, and a 42 U.S.C. §1983 claim under the Commerce Clause, the Fifth and

Fourteenth Amendments. Once the Motion to Dismiss was filed the Plaintiff admitted in their Response (Docket No. 61) that some of their causes of action are not appropriate and joined with the Defendants in asking that these claims be dismissed. The Plaintiffs admit that the Sherman Antitrust Act claim is invalid, their Commerce Clause claim is without factual support and agree that there is insufficient evidence to support the 42 U.S.C. §1985 claim. The Plaintiffs stand by their initial stance that the Racketeering and 42 U.S.C. §1983 claims are valid.

The Court finds that the Plaintiff's Racketeering claim is legally invalid as plead. According to the F.R.C.P. 9(b) a claim of fraud must be stated with particularity. The Court has held that a detailed explication of the factual underpinnings of a Racketeer Influenced and Corrupt Organizations ("RICO") Act claim is required for the expeditious progress of the litigation, in light of the stigmatizing effect of the quasi-criminal nature of the claims made against the named defendants. *Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1108 (9th Cir. 2003). The Plaintiffs have failed to meet this requirement for pleading with particularity, rendering their RICO claims invalid.

The Defendants assert that the issues raised by the Plaintiffs are barred by the doctrine of *res judicata* based on an August 21, 2002 order in civil case number 01-503, by the Honorable David C. Bury, granting summary judgment in favor of the defendants in an action brought by the same Plaintiffs now before the Court, alleging violations relating to the

administration of Section 8 housing program of the Department of Housing and Urban Development. In its order of August 21, 2002, the Court found that the Plaintiffs have no protected interest in pursuing their constitutional claims under the Fifth and Fourteenth Amendments. These same Plaintiffs filed a complaint on May 17, 2004, which was Dismissed by the Honorable Frank R. Zapata based on the doctrine of *res judicata* in a September 29, 2006 order in civil case 04-260.

The Plaintiffs' Request for Leave to File an Amended Complaint is denied because their claims are precluded by the doctrine of *res judicata*. *Res Judicata* precludes the parties, and their privies, from relitigating issues that were, or that could have been, raised in a previous action where a final judgment on the merits was reached. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The Court does not agree with the Plaintiffs' claim that no privity exists between the parties in civil cases 01-503 and 04-260.

In Case 01-503 the defendants included the City of Tucson City Manager, the Administrator of Housing Assistance Programs and Community Service Department Section 8 Housing, and the Inspector General of the U.S. Department of Housing and Urban Development. In Case 04-260 the defendants included the City of Tucson, the Assistant Attorney to the City of Tucson, the City of Tucson Community Services Director and the U.S. Department of Housing and Urban Development. In the case before the Court today the Defendants include two Tucson City

Attorneys, five employees of the City of Tucson Department of Neighborhood Resources, an employee of the City of Tucson Community Services Department, an employee of the City of Tucson Section 8 Housing Program, the City of Tucson Office of the City Attorney, the Department of Neighborhood Resources and the City of Tucson.

Privity "involves a person so identified in interest with another that he represents the same legal right." *Road Sprinkler Fitters Local Union No. 669 v. G&G Fire Sprinklers Inc.,* 102 Cal. App. 4th 765, 772 (Cal. Ct. App. 2002). The Court finds that "there is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government." *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 402-403 (1940). It is clear to the Court that the current Defendants, as employees of the City of Tucson, or its subdivisions related to the Section 8 program, are clearly identified with the interests of the defendants named in both civil cases 01-503 and 04-260.

The Defendants' Motion to Dismiss included a request for sanctions, which the Court will deny at this time. Should the Plaintiffs continue to file the same claims, which have been ruled upon by three District Court Judges, the Court will consider sanctions.

Based on the foregoing,

IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss is GRANTED with prejudice;

IT IS FURTHER ORDERED that the Plaintiff's Motion for Leave to File Amended Complaint is DENIED,

IT IS FURTHER ORDERED that the Defendants' Request for Sanctions is DENIED.

DATED this 1st day of May, 2007.

/s/ Raner C. Collins
Raner C. Collins
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA KONARSKI; et al., Plaintiffs-Appellants, v. CITY OF TUCSON; et al., Defendants-Appellees.	No. 06-17139 D.C. No. CV-04-00260-FRZ District of Arizona, Tucson ORDER
FRANK KONARSKI, Individually as husband, and as owner of FGPJ apartments; et al., Plaintiffs-Appellants, v. MARY JEAN RACITI, as City of Tuscon senior city attorney and individually; et al., Defendants-Appellees.	No. 07-16062 D.C. No. CV-06-00177-RCC District of Arizona, Tucson ORDER (Filed Oct. 2, 2008)

Before: SILER,* McKEOWN, and CALLAHAN, Circuit Judges.

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* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

Footnote ** in the memorandum disposition filed on August 18, 2008, is deleted. With this deletion, the panel denies the petition for rehearing.

Judges McKeown and Callahan have voted to deny the petition for rehearing en banc and Judge Siler so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX E

[Code of Federal Regulations]
[Title 24, Volume 1]
[Revised as of January 1, 2007]
From the U.S. Government Printing Office
via GPO Access
[CITE: 24CFR24.610]

[Page 261]

TITLE 24 – HOUSING AND URBAN DEVELOPMENT

PART 24_GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) –

Subpart F_General Principles Relating to Suspension and Debarment Actions

Sec. 24.610 What procedures does the Department of Housing and Urban Development use in suspension and debarment actions?

In deciding whether to suspend or debar you, we handle the actions as informally as practicable, consistent with principles of fundamental fairness.

(a) For suspension actions, we use the procedures in this subpart and subpart G of this part.

(b) For debarment actions, we use the procedures in this subpart and subpart H of this part.

APPENDIX F

[Code of Federal Regulations]
[Title 24, Volume 1]
[Revised as of January 1, 2007]
From the U.S. Government Printing Office
via GPO Access
[CITE: 24CFR24.700]

[Page 263]

TITLE 24 – HOUSING AND URBAN DEVELOPMENT

PART 24_GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) –

Subpart G_Suspension

Sec. 24.700 When may the suspending official issue a suspension?

Suspension is a serious action. Using the procedures of this subpart and subpart F of this part, the suspending official may impose suspension only when that official determines that –

(a) There exists an indictment for, or other adequate evidence to suspect, an offense listed under Sec. 24.800(a), or

(b) There exists adequate evidence to suspect any other cause for debarment listed under Sec. 24.800(b) through (d); and

(c) Immediate action is necessary to protect the public interest.

APPENDIX G

[Code of Federal Regulations]
[Title 24, Volume 1]
[Revised as of January 1, 2007]
From the U.S. Government Printing Office
via GPO Access
[CITE: 24CFR24.760]

[Page 265]

TITLE 24 – HOUSING AND URBAN DEVELOPMENT

PART 24_GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) –

Subpart G_Suspension

Sec. 24.760 How long may my suspension last?

(a) If legal or debarment proceedings are initiated at the time of, or during your suspension, the suspension may continue until the conclusion of those proceedings. However, if proceedings are not initiated, a suspension may not exceed 12 months.

(b) The suspending official may extend the 12 month limit under paragraph (a) of this section for an additional 6 months if an office of a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests an extension in writing. In no event may a suspension exceed 18 months without initiating proceedings under paragraph (a) of this section.

(c) The suspending official must notify the appropriate officials under paragraph (b) of this

section of an impending termination of a suspension at least 30 days before the 12 month period expires to allow the officials an opportunity to request an extension.

No. 08-1118

In The

Supreme Court of the United States

FRANK KONARSKI, et al.,

Petitioners,

vs.

CITY OF TUCSON, ARIZONA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

There is no "right of review" on a writ of certiorari and Petitioners present no "compelling reasons" for this Court to exercise its discretion and grant review. Sup. Ct. R. 10. Their Petition encompasses two suits dismissed in district court, combined by the Ninth Circuit Court of Appeals, both involving the same parties and arising out of the same issues.[1] The Petitioners misstate and misapply federal regulations, statues, court orders and case law trying to create "a matter of exceptional importance." Pet. at 6.

Petitioners accuse the Ninth Circuit Court of Appeals of "defying" the Code of Federal Regulations and rendering a decision "that is inconsistent with the jurisprudence of this Court and courts of other circuits." Pet. at 6-7. Petitioners are wrong. The Ninth Circuit followed well-established case law in its application of the doctrine of *res judicata*. Pet. App. 1a-19a.

The Petitioners first question, their flawed application of the Code of Federal Regulations (C.F.R.), seriously misleads this Court. They insist that the Respondent City of Tucson ("City") has suspended application of the C.F.R.s and is operating in violation of the debarment provisions of the C.F.R.s as pertain to the Section 8 program. They are wrong. Pet. at 8.

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[1] Cases 06-17139 and 07-16062 were consolidated for oral argument by the Ninth Circuit Court of Appeals.

Petitioners, by intentionally ignoring the plain language of the relevant sections of the C.F.R.s deliberately misinform this Court. They cite to sections found in 24 C.F.R. part 24[2] that set forth the process used by the Department of Housing and Urban Development ("HUD"), as a ***federal agency***, to initiate a debarment or suspension. The same C.F.R.s also establish that debarment is a discretionary action. App. at 24. The debarment regulations found at 24 C.F.R. part 24 are inapplicable to the City. The district court agreed observing that Petitioners failed "to present any authority to support their contentions and interpretation of the statutory and regulatory language relied upon." Pet. App. 10a. Only HUD could initiate a debarment action against Petitioners and, if there were a violation, it could have or should have been raised in the original 2001 lawsuit.

Petitioners' efforts to resurrect an alleged due process violation are barred by *res judicata*. Two District Court judges agreed, as did the Ninth Circuit holding, "[W]e agree with the district court that the two suits are barred by *res judicata*, and affirm." Pet. App. 2a.

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[2] In March 2007, HUD published a proposed rule (72 FR 14,015) (March 23, 2007) that would redesignate 24 C.F.R. part 24 to 2 C.F.R. part 2424. The final change was made at the final stage of the March 23, 2007 rule making. See 72 FR 61,270 (Oct. 29, 2007). The designations in the Petition were those in effect at the time of the 2005 lawsuit.

The second question, that "an extraordinarily methodical and systematic clandestine public corruption scheme . . . should be considered as part of what is today's 'certain instances' that are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of *res judicata* . . . " is simply not worthy of review. Pet. at 11-12. Here the Petitioners literally seek to commit fraud on this Court by inserting words into the quote they attribute to *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 244 (1944) that *nowhere* exist in the original.[3] Pet. at 13, 16, 25. This Court should not countenance such dishonest conduct from Petitioners.

Petitioners do not dispute that the Ninth Circuit correctly found that the requirements of *res judicata* were met. There is no dispute that the doctrine of *res judicata* bars claims from being re-litigated. Petitioners' sole argument about why this Court should accept jurisdiction in the "Whistleblower" case is as follows: the particular facts of this case required the Ninth Circuit to conclude that some equitable exception to the doctrine of *res judicata* in the *Hazel-Atlas Glass* case applied to allow Petitioners to present

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[3] The exact quote from *Hazel-Atlas Glass* reads "This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244, 64 S. Ct. 997, 1000 (1944).

their whistleblower claim to a jury. Petitioners are wrong.

The Ninth Circuit's August 18, 2008, Opinion was unanimous; it was not in conflict with other Courts of Appeal or with any decision of this Court. The Petition for Writ of Certiorari should be denied.

COUNTERSTATEMENT OF THE CASES

Facts

1. Pursuant to the United States Housing Act of 1937 as amended ("Housing Act"), Congress established the Section 8 housing program to provide safe, decent, affordable housing for low-income families. 42 U.S.C.A. § 1437f.[4] The Housing Act also vests the "maximum amount of responsibility and flexibility in program administration" in the local public housing authorities rather than in the federal government. *Rucker v. Davis,* 203 F.3d 627, 631 (9th Cir. 2000); 42 U.S.C.A. § 1437. App. at 23. Congress recognized the importance of local decision-making in housing and allowed local PHAs a great deal of power and

[4] Section 42 U.S.C.A. § 1437f(b)(1) authorizes the Secretary of HUD to enter into annual contributions contracts (ACC) with local PHAs, whereby the PHA may enter into contracts to make housing assistance payments (HAP contracts) to owners for Section 8 housing. Prior to the City decision to no longer enter into new contracts with the Petitioners, they were recipients of housing assistance payments as owners of rental properties.

responsibility. *Williams v. Hanover Housing Authority,* 871 F. Supp. 527, 530 (1994).

The City serves as the local Public Housing Authority ("PHA") in the administration of federally funded and subsidized Section 8 housing. The PHA was created in accordance with the provisions of the United States Housing Act and Arizona Revised Statutes § 36-1404. App. at 27. The PHA is an entity of the city and is neither a federal agency nor an agent of HUD. It is well settled that a local authority does not become an agent of the federal government due to a federal agency's control and supervision of funds. *DeRoche v. United States,* 2 Cl.Ct. 809, 812 (1983). HUD's statutory and regulatory control over the use of funds provided to the City PHA does not convert the PHA into an agent of the United States as the courts have recognized that "it is both appropriate and necessary in disbursing federal grant funds that the federal government establish standards and requirements for projects. . . ." *Eubanks v. United States,* 25 Cl.Ct. 131, 138 (1992), *citing DeRoche v. United States,* 2 Cl.Ct. 809, 812 (1983).

The PHA (City) decision in March 2001 to no longer conduct business with Petitioners is neither a suspension nor a debarment, as both of these actions, if implemented, are initiated by federal officials, not PHAs. App. at 24-25. The City's action did not violate Petitioners' rights or defy the C.F.R.s, rather it fell

within the discretion contemplated by the United States Housing Act of 1937.[5]

2. Petitioners filed suit May 8, 2001, alleging deprivation of their Fifth and Fourteenth Amendment due process rights as a result of the City action. Petitioners, claiming a right to participate as owners in the Section 8 housing program, alleged that the City deprived them of this right without due process. The district court dismissed the case on August 21, 2002, expressly finding that "[P]laintiffs have no property interest or right in the Section 8 housing program and Defendants' decision to no longer renew contracts with Plaintiffs did not rise to the level of a constitutional deprivation." App. at 20-21. The district court dismissal was based in part on relevant provisions of the C.F.R.s and case law.[6] The Ninth

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[5] The district court cited to the problems and complaints generated against Petitioners by tenants and PHA staff in its decision. App. at 2-6.

[6] "The Code of Federal Regulations regarding Section 8 housing expressly and unequivocally states, '*Nothing in this rule is intended to give any owner any right to participate in the program.*'" 24 C.F.R. § 982.4(b); HUD's response to public comment which suggested an appeal process for owners prohibited from participating in Section 8 was as follows: "*Owners have no statutory or regulatory right to participate in the housing choice voucher program*, and consequently *have no due process right* to a hearing on a PHA's decision to disapprove owner participation." 64 Fed. Reg. 56,901 (Oct. 21, 1999); *Roth v. City of Syracuse*, 96 F. Supp. 2d 171 (N.D.N.Y. 2000), *affirmed*, 4 Fed. Appx. 86, 2001 WL 178033 (2nd Cir. 2001), and, *Peoria Area Landlord Association v. City of Peoria, Illinois*, 168 F.Supp.2d 917 (C.D. Ill. 2001) both held that owner/landlords had no

(Continued on following page)

Circuit, 67 Fed. Appx. 458 (9th Cir. 2003) affirmed the district court.

The instant case (06-17139) and misapplication of the debarment sections of the Code of Federal Regulations is simply Petitioners' latest effort to get around the 2002 decision. Pet. at 3-11. Petitioners are trying to enforce rights that do not exist based on an incorrect reading of 24 C.F.R. §§ 600 *et seq*.

3. Petitioners' "Whistleblower" case (07-16062) requires a charitable reading to even begin understanding what is claimed. In April 2006 Petitioners filed a complaint alleging a Racketeering claim, a Sherman Antitrust claim, a 42 U.S.C. § 1985 claim for conspiracy, and a 42 U.S.C. § 1983 claim under the Commerce Clause, the Fifth and Fourteenth Amendments.

The district court held, contrary to Petitioners' position, that the multiple claims and issues raised were barred by the doctrine of *res judicata*, that there was privity between the parties and that they were precluded "from relitigating issues that were, or that could have been raised in a previous action where a final judgment on the merits was reached." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Pet. App. 16a-18a. The court looked specifically at cases 01-503 (the 2002 decision) and 04-260 (06-17139 in the instant

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property interest right to participate in the Section 8 program. All these authorities were found to be persuasive by the District Court Judge. (*emphasis added by court*) App. at 13-18.

action). Describing the parties, the court stated, "[I]t is clear to the Court that the current Defendants, as employees of the City of Tucson, or its subdivisions related to the section 8 program, are clearly identified with the interests of the defendants named in both civil cases 01-503 and 04-260." Pet. App. 17a.

4. Calling this a "Whistleblower" case is misleading. There are no "whistleblowers," these are simply Petitioners' conspiracy theories given a new name. Petitioners fail to advise this Court that they obtained the statements attributed to these individuals[7] six months prior to their filing an Amended

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[7] Petitioners have filed multiple claims against the City, naming many of the same employees and department heads, the statements in the large quote at Pet. 17-23 have been used multiple times in these claims. Briefly, Petitioners have alleged conspiracy, harassment, retaliatory actions, ulterior motive, etc. against the City and its employees in district court since 1998: case 98-528, allegations (arising out of Frank Konarski's 6-18-97 arrest) were excessive force, harassment, assault, battery, negligence and 42 U.S.C. § 1983, case dismissed for Petitioners' failure to comply with court orders and failure to prosecute; case 99-582, sued same Defendants as above, allegations arising out of 6-18-97 arrest included malicious prosecution, false arrest, false imprisonment, and 42 U.S.C. § 1983, case dismissed on statute of limitations, *res judicata* and failure to comply with court orders; case 01-503 Petitioners (five family members) alleged City violated their Fifth and Fourteenth Amendment rights by no longer entering into Section 8 HAP contracts, asserting retaliation, humiliation, and conspiracy between HUD inspectors and City, one of the allegations "there is an ongoing conspiracy to force the Plaintiffs (*sic*) into submission of his civil rights," and "overwhelming evidence of [City's] obvious wrongful termination of business, conspiracy, corruption, discrimination,

(Continued on following page)

Complaint in a prior case against the City. Thus there is no genuine dispute that these claims could have and should have been brought in the prior case. Because these claims were brought in the earlier case, *res judicata* bars them from being raised in the case at hand.

More significant to the instant case, Petitioners never made their "equitable exception to *res judicata* in the *Hazel-Atlas Glass* case" argument to the Ninth Circuit. As such, that argument has been waived. Petitioners mislead this Court when they state: "[A]s part of seeking relief from the dismissal order, as an alternative to their appellate arguments, Petitioners still sought the Court of Appeals to depart from the rigid adherence to the doctrine of *res judicata*, . . . " Pet. at 14. The language at page 14 of the Petition does not support Petitioners' assertion that they raised the "issue" to the Ninth Circuit. The language cited by Petitioners concerns the "privity" prong of *res judicata*, which is not at issue in this Petition. Petitioners' argument to the Ninth Circuit was that there was no privity between the parties and as such the doctrine of *res judicata* did not apply. This attempt at an "argument in the alternative" cannot properly constitute the basis for acceptance of this Petition.

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prejudice, etc." case dismissed (see footnote 6 above); case 04-260 ("Section 8") and 06-177 ("Whistleblower") barred by *res judicata*, cases dismissed by Ninth Circuit August 18, 2008.

Proceedings Below

Petitioners filed a *pro se* Complaint against the City on May 17, 2004 in the United States District Court for the District of Arizona alleging violations under 42 U.S.C. §§ 1982 and 1988. On September 26, 2005, the district court granted the Defendants' (City's) Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Pet. App. 5a-6a.

The dismissal was without prejudice and Petitioners were granted leave to file an amended complaint. In the dismissal the court noted that the claims may be barred by *res judicata*. Petitioners, through their attorney, filed an Amended Compliant on October 26, 2005 (district court case 04-260/Court of Appeals 06-17139). On September 29, 2006, the district court granted Fed. R. Civ. P. 12(b)(6). Motions to Dismiss were filed by HUD and the City. The court found that "[T]he arguments for dismissal are well supported with authority presented." Pet. App. 13a. The court also observed "[Petitioners] oppose the Defendants' motions to dismiss, but do not dispute the legal standards or authority relied upon by the Defendants." Pet. App. 13a. The court went on,

> [U]pon review and consideration of the matters presented, the Court finds that the causes of action raised in the case at bar are

> precluded by *res judicata.*[8] *See Lanphere Enterprises, Inc. v. Koorknob Enterprises,* 145 Fed. Appx. 589, 590-592 (9th Cir. 2005); *Providence Health Plan v. McDowell,* 385 F.3d 1168, 1173 (9th Cir. 2004); *Littlejohn v. United States,* 321 F.3d 915, 919 (9th Cir. 2003).

Pet. App. 13a.

Case 06-177 was filed on April 7, 2006 in the United States District Court for the District of Arizona. The Defendants (City) filed their Motion to Dismiss and Plaintiffs (Petitioners) admitted in their Response "that some of their causes of action are not appropriate" joining with the City in asking that they be dismissed. Pet. App. 15a-16a. Petitioners admitted that "the Sherman Antitrust Act claim is invalid, their Commerce Clause claim is without factual support and agree that there is insufficient evidence to support the 42 U.S.C. § 1985 claim." Pet. App. 16a. The Court determined the Racketeering claim was legally invalid as pled. Pet. App. 16a.

"[F]ollowing a careful review of the Defendants' Motion to Dismiss, the Plaintiff's Response and the Defendant's Reply, the Court will grant the Motion to

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[8] Petitioners specifically excluded HUD and Secretary of HUD Alfonso Jackson from their appeal to the Ninth Circuit in case 06-17139. HUD filed a Motion for Summary Affirmance, dated January 10, 2007 which was granted by the Ninth Circuit on April 6, 2007. The Order indicated HUD was no longer a party to the appeal.

Dismiss and deny the Plaintiff's Motion for Leave to File an Amended Complaint." Pet. App. 15a.

The court noted that in case 01-503 the defendants were City officials and employees and the Inspector General of the U.S. Department of Housing and Urban Development. Pet. App. 17a. The court also noted that in 04-260 the defendants included the City of Tucson, City officials and employees and the U.S. Department of Housing and Urban Development. Pet. App. 17a. Then the court identified the defendants in the pending case, noting that they included two Tucson City Attorneys, five employees of the City of Tucson Department of Neighborhood Resources, an employee of the City of Tucson Community Services Department, an employee of the City of Tucson Section 8 Housing Program, the City of Tucson Office of the City Attorney, the Department of Neighborhood Resources and the City of Tucson. Pet. App. 17a-18a.

Relying in part on *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 402-403 (1940), the court found that "there is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government." The City asserted and the court agreed that the issues raised by Petitioners were barred by *res judicata* based on the August 21, 2002 order in civil case 01-503 granting summary judgment in favor of the City in an action brought by the same Plaintiffs (Petitioners) now before the Court. Pet. App. 16a. The court denied Petitioners' Request for

Leave to File an Amended Complaint "because their claims are barred by the doctrine of *res judicata.*" Pet. App. 17a.

On August 18, 2008, the Ninth Circuit affirmed the district courts' dismissal of the cases stating "[W]e agree with the district court that the two suits were barred by *res judicata,* and affirm." Pet. App. 2a. The court rejected Petitioners' arguments that *res judicata* did not apply, stating

> [T]here is privity in these cases because each current defendant is a government or government employee who is 'so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved.' *In re Schimmels,* 127 F.3d 875, 881 (9th Cir. 1997); *see also Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 402-03 (1940) (holding that there is privity between officers of the same government).

Pet. App. 4a.

REASONS FOR DENYING THE WRIT

The court of appeals correctly applied the long-standing principles firmly established by this Court for addressing the doctrine of *res judicata.* There is no conflict with this Court's precedents or the decisions of other circuits.

I. There is no conflict with courts of other circuits

Nothing in the Petition supports the statement that the Ninth Circuit's decision "is inconsistent with the jurisprudence of this Court and courts of other circuits." Pet. at 6-7.

A. Section 8 case

Neither the Sixth Circuit decision in *Buckeye Terminix Company v. United States Department of Housing and Urban Development,* 900 F.2d 259, 1990 WL 47472 (6th Cir. 1990) nor the Fifth Circuit decision in *Rogers v. United States of America, Operating Through the United States Department of Housing and Urban Development,* 58 Fed. Appx. 595, 2003 WL 261771 (5th Cir. 2003)[9] are in conflict with the Ninth Circuit. Neither of the decisions support Petitioners' claim; they are complaints brought against HUD and the United States challenging debarment proceedings initiated by HUD.

Petitioners' arguments also ignore the primary purpose of HUD-funded housing programs; the intended beneficiaries of the programs are low-income tenants, *not* the landlords who may derive a financial benefit from the program. *Kunkler v. Fort Lauderdale*

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[9] In the Fifth Circuit, "[u]npublished opinions issued on or after January 1, 1996 are not precedent except under the doctrine of *res judicata,* collateral estoppel, or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like)." An unpublished opinion may be cited pursuant to Fed. R. App. P. 32.1(a). (5th Cir. R. 47.5.4).

Housing Authority, 764 F. Supp. 171, 175 (1991). Petitioners' complaint and misapplication of the Code of Federal Regulations does not create a "right" that has been violated. There is nothing that is presented in their Petition that "is of importance to the public, as distinguished from that of the parties . . . " *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 75 S. Ct. 614, 620 (1955), *citing Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L.Ed. 712.

There is no "injustice" in the Ninth Circuit decision. The City PHA has neither the ability nor the obligation to commence debarment proceedings. Petitioners have cited no cases that so hold, let alone any that create a conflict with the Ninth Circuit.

B. Whistleblower case

The 65-year-old *Hazel-Atlas Glass* case has been overturned and is no longer good law. Even if *Hazel-Atlas Glass* were good law, it does not apply here. *Hazel-Atlas Glass* involves the question of a party's ability to obtain equitable relief from a judgment that is fraudulently obtained against that party. *Hazel-Atlas Glass* held that the court could set aside a judgment it entered in a patent case where there was subsequent evidence presented that the judgment was obtained through fraudulent means and that the

set aside could occur even after the term of the court expired.[10]

The setting aside of a judgment, post term, has nothing to do with *res judicata* or this case. In fact, Petitioners outrageously try to mislead this Court by unilaterally inserting the term "*res judicata*" into the quote they attribute to *Hazel-Atlas Glass* as support for their position that it was not proper for the District Court to dismiss their "Whistleblower" case or for the Ninth Circuit to affirm that dismissal. Pet. at 13, 16, 25. Petitioners did not allege, and there is no evidence of, any fraud by the City in obtaining prior judgments against Petitioners. The City is not aware of and the Petitioners do not cite any cases where, like this case, all of the elements of *res judicata* are met but a judge simply decided not to apply the doctrine because s/he felt such application would be inequitable or unjust.

There are no inconsistent circuit decisions on this point as claimed by Petitioners. Pet. at 16. There are no cases that hold there is an equitable exception to *res judicata* even where all the elements of the doctrine are satisfied.

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[10] "Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after expiration of the term at which the judgments were finally entered." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944), *citing Bronson v. Schulten*, 104 U.S. 410, 26 L.Ed. 797.

II. *Res Judicata* was properly applied by the courts

These issues have been fully and fairly litigated. "[T]he doctrine of *res judicata* provides that a 'final judgment on the merits bars further claims by parties or their privies based on the same cause of action, and is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction.'" *Hells Canyon Preservation Council v. United States Forest Service,* 403 F.3d 683, 686 (9th Cir. 2005), *citing Headwaters Inc. v. U.S. Forest Serv.,* 399 F.3d 1047, 1051-52 (9th Cir. 2005). *Res judicata* or claim preclusion treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same cause of action. *Robi v. Five Platters, Inc.,* 838 F.2d 318, 321 (9th Cir. 1988).

Petitioners' argument that the C.F.R. "violation" could not have been brought in the 2001 case not only ignores the inapplicability of those regulations to the City, but also incorrectly states that "the law would not permit the doctrine of *res judicata* to apply to this situation." Pet. at 9. This posture disregards the facts; they litigated their Section 8 case and lost. A new or change of legal theory and new factual allegations do not create a new cause of action. *Constantini v. Trans World Airlines,* 681 F.2d 1199, 1201 (9th Cir. 1982).

The district courts and the Ninth Circuit Court of Appeals, looking to the August 21, 2002 decision dismissing the original Section 8 case correctly applied the doctrine of *res judicata.* App. 1-22. Pet. App. 1a-21a.

CONCLUSION

There are no "diverging legal holdings" among the circuits. There is no "matter of exceptional importance" warranting this Court's exercise of jurisdiction. For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Frank Konarski, et al., Plaintiffs, v. Susan Gaffney, et al., Defendants.	CV 01-503 TUC DCB **ORDER** (Filed Aug. 21, 2002)

Pending before this Court is Defendants Valfre and Keene's ("Defendants") Motion for Summary Judgment. Defendants seek summary judgment on Plaintiffs' constitutional claims under the Fifth and Fourteenth Amendments, as well as Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000, *et seq.* For the reasons set forth below, Defendants' Motion for Summary Judgment is granted. Plaintiffs have no protected interests under either the Fifth or Fourteenth Amendment. In addition, Plaintiffs suffered no adverse employment decision required for Title VII's protections. Even if Plaintiffs did suffer such a deprivation, this Court lacks subject matter jurisdiction over Plaintiffs' Title VII claim inasmuch as Plaintiffs never filed the requisite administrative claim with the Equal Employment Opportunity Commission ("EEOC").[1]

[1] Neither party filed the required separate notice of hearing. Local Rule 1.10(f), District of Arizona. Therefore, pursuant

(Continued on following page)

INTRODUCTION

Plaintiffs are landlords who operate under the business name FGPJ Apartments. Defendants are employees of the City of Tucson, responsible for managing federally funded housing programs, including low-income "Section 8" housing, pursuant to the United States Housing Act of 1937, 42 U.S.C. § 1437f. Plaintiffs rented apartments to Section 8 clients of Defendants. Plaintiffs rented their apartments exclusively to Section 8 clients and apparently never sought to rent to the private sector.

In 1993, a Section 8 resident of Plaintiffs' apartments filed a complaint against Plaintiff Frank Konarski with the Office of Fair Housing and Equal Opportunity of the United States Department of Housing and Urban Development. In that complaint, the Section 8 resident alleged that Plaintiff Frank Konarski threatened her, entered her apartment without authorization, and verbally abused her based upon her Hispanic descent. On November 30, 1994, the Civil Rights Section of the Arizona Attorney General's office issued its Findings of Fact and Conclusions of Law. In those Findings and Conclusions, the Arizona Attorney General's office determined that Plaintiff Frank Konarski "did, in fact, engage in unwelcome and unsolicited verbal conduct of an ethnic nature which was sufficiently severe and

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to Rule 1.10(f) of the Local Rules for the District of Arizona, this Court shall decide the matter based upon the pleadings alone.

pervasive as to create a hostile, intimidating and offensive living environment for Complainant and other Hispanic tenants." (Exhibit A, Attachment 1, Defendants' Statement of Facts.) The Arizona Attorney General's office further determined that, "[a]lthough [Plaintiff Frank Konarski] denies making the comments attributed to him, the overwhelming evidence establishes that his denials are not credible and that he did, in fact, made (sic) the comments alleged." (*Id.*)

In January of 2000, another Section 8 resident of Plaintiffs' apartments filed a complaint against Plaintiff Frank Konarski with the Office of Fair Housing and Equal Opportunity. Like the previous complaint, the complaining Section 8 resident alleged that Plaintiff Frank Konarski subjected her to racially motivated verbal abuse. Like the previous complaining resident, this Section 8 resident was Hispanic.

In January of 2001, the Southern Arizona Housing Center ("SAHC") investigated Plaintiff Frank Konarski for violations of the Fair Housing Act. Plaintiff Frank Konarski allegedly threatened his Section 8 tenants with eviction if they showed any support for the Section 8 tenant who filed the complaint with SAHC. SAHC considered Plaintiff Frank Konarski's threats as retaliation against the Section 8 resident who made the Fair Housing Complaint with SAHC.

On March 5, 2001, Defendant Valfre advised Plaintiffs in writing that the Community Services Department, Section 8 Housing, of the City of Tucson would not initiate any new Section 8 housing contracts with Plaintiffs. Defendant Valfre's stated bases for this decision were "the numerous complaints expressed by the tenants and the continuing problems imposed on our staff." (Exhibit A, Attachment 5, Defendants' Statement of Facts.) Defendant Valfre also advised that the Community Services Department would honor any proper existing contracts, but such contracts would not be renewed upon their expiration. (*Id.*)

In a letter dated May 3, 2001, Defendant Valfre provided Plaintiff Frank Konarski's attorney with a detailed explanation of the bases for Defendant Valfre's decision to not renew any contracts with Plaintiffs. In that letter, Defendant Valfre described Plaintiff Frank Konarski's abusive, argumentative, accusatory, and abrasive demeanor toward employees of the City of Tucson's Community Services Department, Section 8 Housing. (*Id.*) Defendant Valfre explained that Plaintiff Frank Konarski's behavior rendered him "persona non grata" at the offices of his City Council member, the City Manager (Defendant Keene), and the Mayor. (*Id.*)

In that same letter, Defendant Valfre described the numerous complaints filed by Section 8 residents, typically of Hispanic descent, against Plaintiff Frank Konarski. Plaintiff Frank Konarski was also charged with verbally assaulting a guest of a Section 8

resident on December 26, 2000.[2] Defendant Valfre also explained to Plaintiff Frank Konarski's attorney that four (4) of Plaintiffs' apartment units failed mandatory inspections under Section 8. Finally, Defendant Valfre explained that there were numerous clauses and provisions in Plaintiffs' community policies and leases that violated the Arizona Residential Landlord Tenant Act, A.R.S. § 33-1301, *et seq.*

On May 8, 2001, Plaintiffs filed this suit in the United States District Court for the District of Columbia. On June 11, 2001, the District Court for the District of Columbia transferred this case to this Court based upon improper venue. On July 30, 2002,

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[2] In their Complaint, Plaintiffs allege that Plaintiff Frank Konarski was "brutalized" by Tucson Police as some sort of retaliatory action by the United States Department of Housing and Urban Development ("HUD") and that a lawsuit had been filed accordingly. (Plaintiffs' Complaint, p. 4, ¶ "6.") In fact, Plaintiff Frank Konarski filed two lawsuits with the District Court of Arizona arising out of his alleged brutalization. (*See Konarski v. City of Tucson, et al.* (CV 98-528 TUC-RCC and CV 99-582 TUC-ACM). Both actions were dismissed for Plaintiff Frank Konarski's failure to prosecute. Additionally, some of Plaintiff Frank Konarski's claims in the second suit were dismissed on the basis of *res judicata*.

In the Order dismissing Plaintiff Frank Konarski's first action, District Judge Raner Collins noted Plaintiff Frank Konarski's "persistent belligerent behavior," as well as Plaintiff Frank Konarski's "uncooperative behavior." Plaintiff Frank Konarski's behavior was of such a degree that it led to Judge Collins' "unprecedented . . . Minute Order advising Mr. Konarski that future attempts to contact the judge or his staff by telephone would not be permitted." (CV 98-528, 8/30/99.)

after more than a year without any meaningful activity by Plaintiffs, Defendants filed their Motion for Summary Judgment.

On May 14, 2001, Defendant Valfre provided written notice to all Section 8 residents in Plaintiffs' apartments of his March 5, 2001 decision. In that notice, Defendant Valfre advised the Section 8 residents that, *inter alia*, they could move to a new location without interruption of their Section 8 benefits.

STANDARD FOR MOTIONS FOR SUMMARY JUDGMENT

A motion for summary judgment shall be granted if there are no genuine issues of material fact, entitling the moving party to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2525, 2511 [sic] (1986). A motion for summary judgment should be granted if reasonable minds could not differ that the moving party must prevail as a matter of law. *Id.* at 250-251, 106 S.Ct. at 2511-2512. A mere scintilla of evidence is insufficient to defeat a motion for summary judgment. *Id.* at 251, 106 S.Ct at 2512. The party opposing a motion for summary judgment may not rest upon his pleadings, but must set forth specific facts which indicate that there is a genuine issue for trial. *Id.* at 250, 106 S.Ct. at 2511; Rule 56(e), Fed.R.Civ.P. The party with the burden of proof at trial also bears that same burden when making or opposing a motion for summary

judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986).

When determining a motion for summary judgment, the Court is not required to comb the record for some reason to deny the motion. *Carmen v. San Francisco Unified School District,* 237 F.3d 1026, 1029 (9th Cir. 2001). To require otherwise would render the Court the lawyer for the nonmovant, performing the lawyer's duty of setting forth specific facts creating a genuine issue sufficient to defeat the motion. *Id.* at 1031.

Motions for summary judgment should be viewed "not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure just, speedy and inexpensive determination of every action,'" *Celotex*, 477 U.S. at 327, 106 S.Ct. at 2548. (Citations omitted.) Accordingly, the rules governing motions for summary judgment should be enforced with regard not just for rights of the nonmovant, but also for the rights of the party contending that there exists no genuine issue of material fact. *Id.*

PROCEDURAL ISSUES.

On July 2, 2002, this Court ordered, among other things, that Plaintiffs were required to respond to any dispositive motions by Defendants in strict compliance with Local Rule 1.10, District of Arizona. (document 35) The July 2, 2002 Order arose out of a previous Order, dated April 12, 2002. (document 24)

In the April 12, 2002 Order, Plaintiff's counsel was "cautioned that he must comply with the Local Rules of this District. . . ." (*Id.*) On May 30, 2002, this Court issued another Order wherein it was noted that Plaintiffs' counsel continued to violate and ignore the Local Rules of this District. (document 30) Accordingly, in its Order of July 2, 2002, this Court warned Plaintiffs that if they failed to respond to Defendants' dispositive motions "in strict and substantial compliance with Local Rule 1.10, such non-compliance will be deemed by this Court as Plaintiffs' consent to the granting of Defendants' dispositive motions. Local Rule 1.10(i), District of Arizona." (document 35)

On August 12, 2002, Plaintiffs timely filed their "Answer to Defendant City of Tucson (sic) Motion for Summary Judgment." (document 42) In their Answer, Plaintiffs do not actually respond to Defendants' Motion, but merely make numerous unsubstantiated allegations. More importantly, however, Plaintiffs failed to "set forth separately from the memorandum of law, and in full, the specific facts" upon which Plaintiffs oppose Defendants' Motion. Local Rule 1.10(1)(1), District of Arizona. The required statement of facts are required to be "set forth in serial fashion and not in narrative form" and "shall refer to a specific portion of the record where the fact may be found." *Id.* Nevertheless, despite the plain and unambiguous requirements of Local Rule 1.10(1)(1) and this Court's Order that Plaintiffs strictly and substantially comply with Local Rule 1.10, Plaintiffs inexplicably failed to file the mandatory separate

statement of fact. Therefore, pursuant to Local Rule 1.10(i), and for Plaintiffs' disregard of the orders of this Court, Defendants' Motion for Summary Judgment will be granted.

Despite Plaintiffs' refusal to comply with the Local Rules of this District, Defendants' Motion for Summary Judgment may also be granted pursuant to Rule 56(e), Fed.R.Civ.P. Under Rule 56(e), "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party *may not rest upon the mere allegations or denials of the adverse party's pleading*, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing there is a genuine issue for trial." Rule 56(e), Fed.R.Civ.P. (Emphasis added)

Plaintiffs do, in fact, rest upon the mere allegations or denials of their Answer. In their Answer, Plaintiffs avow that they will establish and prove their allegations. (Plaintiffs' Answer, p. 2.) However, Plaintiffs never set forth any specific facts which show there is a genuine issue of material fact sufficient to defeat Defendants' Motion for Summary Judgment. In other words, Plaintiffs fail to comply with the express requirements of Rule 56(e), Fed.R.Civ.P. Inasmuch as Plaintiffs fail to respond to Defendants' Motion for Summary Judgment in compliance with Rule 56(e), an appropriate summary judgment "shall" be entered against them. *Id.* As is fully explained below, summary judgment is appropriate in this case,

and will be entered against Plaintiffs pursuant to Rule 56(e).

Finally, in the first sentence of their Answer, Plaintiffs declare that "reasonable discovery in this case has not yet taken place." (Plaintiffs' Answer, p. 2.) This statement is belied by the open-court avowal of Plaintiffs' counsel on July 1, 2002, that Plaintiffs were prepared to oppose any dispositive motion filed by Defendants' and that no additional discovery was required to do so.

> THE COURT: All right. And I want to make sure that the plaintiff has had an opportunity to respond to any such motions, including any documents that may be required by the plaintiff. And I would ask whether, at this point, there has been an exchange of any exhibits or documentary evidence, including the file – the government files that the plaintiff may need in this case.
>
> MS. HUGHES (COUNSEL FOR DEFENDANTS): I have –
>
> THE COURT: I'm asking Ms. Hughes for now.
>
> MS. HUGHES: I sent – and this was probably almost a year ago – I have received nonuniform interrogatories from Mr. Bach. And I sent him several documents. I sent him copies of memorandums (sic), e-mails, rules, regulations. He received a packet that was probably easily three inches thick and he's not indicated to me that he was lacking

anything else. We hadn't begun disclosure, but he has a substantial amount of information at this point.

THE COURT: Mr. Bach, do you need any other documents?

MR. BACH (COUNSEL FOR PLAINTIFFS): No. I think the documents – the key documents we have. We believe that, although you're not asking for what our idea of the case is, that we have sufficient evidence to proceed, Your Honor.

THE COURT: Okay. Well, my concern is that this case has been – at least the complaint has been on file for more than a year and nothing has happened.

MR. BACH: I understand. We are ready to proceed on the short docket, your honor.

THE COURT: That's good. All right. We'll do that. Ms. Hughes, would you need any more than – well, let me ask you this. Do you need any depositions? Any type of discovery pertaining to these dispositive motions?

MS. HUGHES: No, Your Honor.

THE COURT: Mr. Bach, do you need any discovery to –

MR. BACH: We need to take depositions, Your Honor.

> THE COURT: Well, I appreciate that. But what about only with respect to dispositive motions?
>
> MR. BACH: No, sir, We're ready to proceed.

(Reporter's Transcript of Proceedings, July 1, 2002, pp. 5:5-6:16.)

Having avowed to this Court that Plaintiffs were prepared to oppose and respond to Defendants' dispositive motion, and that no further discovery was required in that regard, Plaintiffs cannot now be heard to say that "reasonable discovery" has yet to occur.

Regardless, if Plaintiffs truly believed that they lacked "facts essential to justify the party's opposition," Plaintiffs could and should have filed a motion to continue Defendants' Motion for Summary judgment to permit discovery, pursuant to Rule 56(f), Fed.R.Civ.P. This Plaintiffs did not do. Thus, even if Plaintiffs had not declared in open court their readiness to oppose Defendants' Motion for Summary Judgment, Plaintiffs have requested no relief under Rule 56(f) and none will be offered.

In addition to the procedural bases for granting Defendants' Motion for Summary Judgment, the Motion is granted on the merits, as well.

PLAINTIFFS' FIFTH AND FOURTEENTH AMENDMENT CLAIMS.

In their Complaint, Plaintiffs allege that Defendants violated their Fifth and Fourteenth Amendment rights against the deprivation of life, liberty, or property without the due process of law. (Plaintiffs' Complaint, p. 2, ¶¶ "3" and "4.")[3] Inasmuch as Plaintiffs do not allege that their lives or liberties have been deprived, and after liberally construing the complaint, it appears as though Plaintiffs allege they were denied a property interest without due process. Apparently, Plaintiffs believe that when Defendant Valfre decided not to renew any contracts with Plaintiffs, he denied Plaintiffs their right to participate in the Section 8 housing program. (*Id.*, p. 4, ¶ "5.") Plaintiffs also appear to believe that they were entitled to notice and a right to be heard before Defendant Valfre could refuse to renew any of Plaintiffs' Section 8 housing contracts. (*Id.*, p. 4, ¶ "7.")

Plaintiffs are simply incorrect that they have a right to participate in the Section 8 housing program. In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972), the Supreme Court

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[3] This Court places the paragraph numbers of Plaintiffs' Complaint in quotes in light of the fact that on page 3 of the Complaint, paragraph 5 is followed by paragraph 3 and the numbering restarts from there. By placing the paragraph numbers in quotes, this Court seeks to make clear that it refers exclusively to the numbers as they appear in Plaintiffs' Complaint.

explained that property interests are not created by the Constitution. *Id.* at 577, 92 S.Ct. at 2709. "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id. See Bollow v. Federal Reserve Bank of San Francisco,* 650 F.2d 1093, 1098 (9th Cir. 1981) (Property interest is "created by 'rules and understandings' that stem from an independent source, such as relevant statutes, regulations, and ordinances, or express or implied contracts.") Thus, in order for Plaintiffs to have a protected property interest, the statutes or rules regarding Section 8 housing must create and define such interests.

The Code of Federal Regulations regarding Section 8 housing expressly and unequivocally states, "*Nothing in this rule is intended to give any owner any right to participate in the program.*" 24 C.F.R. § 982.306(e) (Emphasis added), The term "owner" is defined as "Any person or entity with the legal right to lease or sublease a unit to a participant." 24 C.F.R. § 982.4(b). Plaintiffs, through their company FGPJ Apartments, constitute an entity with the legal right to lease apartment. Arguably, however, 24 C.F.R. § 982.4(b) could be read to grant landlords like Plaintiffs the right to participate in Section 8 housing programs.

Under the rules of construction, this Court should interpret apparently conflicting provisions so

that no provision will be inoperative or superfluous. *In re Catapult Entertainment, Inc.*, 165 F.3d 747, 751 (9th Cir. 1999), *cert dismissed,* 528 U.S. 924, 120 S.Ct. 369 (1999). In accordance with this rule and in light of 24 C.F.R. § 982.306(e), this Court determines that the "legal right" referred to in the definition of "owner" refers to the requisite possessory right a property owner must have to rent or lease any piece of property. *See Restatement (Second) of Property: Landlord-Tenant*, § 1.2, comment a ("In order to satisfy the possession requirement of the landlord-tenant relationship, the transferred interest in the leased property must be one that the owner is legally capable of possessing now or in the future."); *49 Am.Jur. 2d. Landlord and Tenant*, § 3 ("[T]he right to let property is an incident of the title and possession. . . ."); *Friedman on Leases,* 4th ed., § 2.1, p. 17 ("Execution of a lease, as landlord, by a party without title or an agent without authority is a nullity."). It does not refer to the right to participate in the Section 8 housing program. If it did, 24 C.F.R. § 982.306(e) would be rendered superfluous.

This determination that Plaintiffs' have no right to participate in Section 8 housing is further supported by HUD's response to public comment which suggested that HUD should provide an appeals process for owners prohibited from participating in the Section 8 housing program. 64 Fed.Reg. 56, 901 (Oct. 21, 1999). HUD's response was as follows: "*Owners have no statutory or regulatory right to participate in the housing choice voucher program,*

and consequently *have no due process right* to a hearing on a PHA's decision to disapprove owner participation." *Id.* (Emphasis added) Clearly, according to HUD, the agency responsible for Section 8 housing programs, Plaintiffs have no right to participate in Section 8 housing.

This Court's determination that Plaintiffs have no right to participate in the Section 8 program and, thus, no protected property interest therein, is also supported by federal case law. In *Roth v. City of Syracuse*, 96 F.Supp.2d 171 (N.D.N.Y. 2000), *affirmed*, 4 Fed.Appx. 86, 2001 WL 178033 (2nd Cir. 2001), a landlord who participated in the Section 8 housing program alleged that he was denied his property interest right to participate in the program without due process. *Id.* at 177. The district court never reached the question of due process, however, because it determined that the plaintiff had no property right to participate in the Section 8 housing program. *Id.* at 177-178. The district court held as follows:

> [A] reading of the relevant regulation itself reveals that it can not reasonably be interpreted as creating a property interest. After setting forth the grounds on which a public housing agency "may" in its administrative discretion deny approval to lease a unit from an owner, 24 C.F.R. 982.306(e) states: Nothing in this rule is intended to give any owner any right to participate in the program." Thus, the very premise of plaintiff's argument regarding [the local housing

> authority's] "narrowly circumscribed" discretion to disapprove lease applications based on the standards set forth in the regulation is belied by the language of the regulation itself, which was clearly intended to obviate the very construction urged by plaintiffs.

Id. at 177.[4]

In *Peoria Area Landlord Association v. City of Peoria, Illinois,* 168 F.Supp.2d 917 (C.D. Ill. 2001), the District Court for the Central District of Illinois also addressed the issue of whether landlords who participate in Section 8 housing programs have a right to do so, The court made the following determination: "[H]ousing authorities have considerable discretion to determine which landlords can participate in the program, and nothing in the regulations gives any property owner the right to participate by receiving subsidies." *Id.* at 925, fn. 4.

This Court finds both of the aforementioned cases persuasive. Since property interests are created and defined only by independent sources, such as statutes and regulations, any property interest or right to participate in Section 8 housing programs must be delineated in the relevant statutes or regulations. *See Board of Regents supra.* In this case, the Federal Regulations applicable to Section 8 housing

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[4] Defendants relied upon the three preceding authorities in their Motion for Summary Judgment. Plaintiffs, however, fail to mention, much less address, any of them.

clearly and unambiguously state that landlords, such as Plaintiffs, have no right to participate in the Section 8 program. 24 C.F.R. § 982.306(e). Plaintiffs have not produced any evidence or legal authority to the contrary. Accordingly, and as a matter of law, Plaintiffs were not deprived of a property interest or right when Defendants declined to renew any Section 8 contracts with Plaintiffs. Lacking any property interest in participating in Section 8 housing, Plaintiffs were not entitled to the constitutionally mandated due process. Therefore, Plaintiffs suffered no deprivation under either the Fifth or Fourteenth Amendments and Defendants are entitled to summary judgment on those claims.

PLAINTIFFS' TITLE VII CLAIMS.

Plaintiffs claim that this Court has subject matter jurisdiction pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (Plaintiffs' Complaint, ¶ "3.") Presumably, since Plaintiffs allege that this Court's jurisdiction arises from Title VII, Plaintiffs also allege that they suffered a deprivation under Title VII. The purpose of Title VII, as explained by the United States Supreme Court, is to influence "primary conduct" so as to avoid "unlawful *employment* discrimination." *Faragher v. City of Baca* [sic] *Raton*, 524 U.S. 775, 805-806, 118 S.Ct. 2275, 2292 (1998) (Emphasis added). In other words, "Title VII of the Civil Rights Act of 1964, as amended, protects individuals against *employment* discrimination on the basis of race, color, religion, sex or

national origin." 29 C.F.R. § 1606.2 (Emphasis added). Indeed, under Title VII, it is unlawful for any employer to fail to hire or to fire or segregate against any individual because of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) and (2).

In the present case, Plaintiffs do not allege that any one of them was an employee of Defendants at any time relevant to this case. Defendant Valfre and his successor at the City of Tucson's Community Services Department, Peggy Morales, both submitted sworn affidavits declaring that, to the best of their knowledge, none of the Plaintiffs are or ever have been employed by the City of Tucson. (Exhibit A, ¶ 13, Exhibit B, ¶ 20, Defendants' Statement of Facts). Plaintiffs, on the other hand, submitted no evidence of any employment relationship with the City of Tucson or Defendants. Thus, there is no question that Plaintiffs never were employees of the City of Tucson or Defendants at any time relevant to this case. Accordingly, there was no employment discrimination and Plaintiffs have no rights under Title VII.

Regardless, assuming *arguendo* that Plaintiffs are covered by Title VII, this Court lacks subject matter jurisdiction over such claims. In the Ninth Circuit, Title VII plaintiffs must first exhaust their administrative remedies. *Sommatino v. United States*, 255 F.3d 704, 707-708 (9th Cir. 2001). Here, there is no evidence to indicate that Plaintiffs pursued and exhausted any administrative remedies. In the Ninth Circuit, "substantial compliance with the

presentment of discrimination complaints to an appropriate administrative agency *is* a jurisdictional prerequisite." *Id.* at 708 (Emphasis original); *See also Lowe v. City of Monrovia,* 755 F.2d 998, 1003 (9th Cir. 1986) ("When a plaintiff fails to raise a Title VII claim before the EEOC, the district court lacks subject matter jurisdiction to hear it.")[5] Inasmuch as Plaintiffs' failed to present any evidence of administrative complaints to the EEOC regarding Plaintiffs' alleged employment discrimination, this Court lacks subject matter jurisdiction, and Plaintiffs' Title VII claims are dismissed in their entirety.

CONCLUSION.

Plaintiffs have no property interest or right in the Section 8 housing program and Defendants' decision to no longer renew contracts with Plaintiffs did not rise to the level of a constitutional deprivation. Plaintiffs were never employees of Defendants and, thus, never suffered employment discrimination. Therefore, Plaintiffs have no claim under Title VII of the Civil Rights Act of 1964. Finally, this Court lacks subject matter jurisdiction over Plaintiffs' Title VII

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[5] It is the duty of this Court to *sua sponte* examine jurisdictional issues. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002) (Citations omitted). Indeed, whenever it appears that this Court lacks subject-matter jurisdiction, as is the case here, this Court is required to dismiss the action. *Id.* (Citations omitted).

claims inasmuch as Plaintiffs never filed the required administrative complaints with the EEOC.

Accordingly,

IT IS ORDERED that Defendants' Motion for Summary Judgement (document 40) is **GRANTED** in its entirety.

IT IS FURTHER ORDERED that Plaintiffs' claims are **DISMISSED with prejudice**, as to all Defendants.

IT IS FURTHER ORDERED that the Clerk of this Court enter judgment in accordance with this Order.

DATED this 20 day of August, 2002.

/s/ David C. Bury
David C. Bury
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Frank Konarski, et al. Plaintiffs, vs. Susan Gaffney, et al., Defendants.	JUDGMENT IN A CIVIL CASE (Filed Aug. 21, 2002) Case No. CV-01-503-TUC-DCB

DECISION BY COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment as GRANTED.

IT IS FURTHER ORDERED that this case is DISMISSED.

August 21, 2002
Date

RICHARD H. WEARE
CLERK

/s/ Cathy Schwader
(By) Cathy Schwader,
Deputy Clerk

42 U.S.C.A. § 1437. Declaration of policy and public housing agency organization

(a) Declaration of policy

It is the policy of the United States –

(1) to promote the general welfare of the Nation by employing the funds and credit of the Nation, as provided in this chapter –

(A) to assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low income families;

(B) to assist States and political subdivisions of States to address the shortage of housing affordable to low-income families; and

(C) consistent with the objectives of this subchapter, to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public;

* * *

24 C.F.R. § 24.50 How is this part written?

(a) This part uses a "plain language" format to make it easier for the general public and business community to use. The section headings and text, often in the form of questions and answers, must be read together.

(b) Pronouns used within this part, such as "I" and "you," change from subpart to subpart depending on the audience being addressed. The pronoun "we" always is the Department of Housing and urban Development.

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24 C.F.R. §24.75 Do terms in this part have special meaning?

This part uses terms throughout the text that have special meaning. Those terms are defined in Subpart I of this part. For example, three important terms are –

(a) *Exclusion or exclusion,* which refers only to discretionary acts taken by a suspending or debarring official under this part or the Federal Acquisition Regulation (48 CFR part 9, subpart 9.4);

(b) *Disqualification or disqualified,* which refers to prohibitions under specific statutes, executive orders (other than Executive order 12549 and Executive Order 12689), or other authorities. Disqualifications frequently are not subject to the discretion of an

agency official, may have a different scope than exclusions, or have special conditions that apply to the disqualification; and

(c) *Ineligibility or ineligible,* which generally refers to a person who is either excluded or disqualified.

Subpart A – General

* * *

24 C.F.R. §24.110 What is the purpose of the nonprocurement debarment and suspension system?

(a) To protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.

(b) A Federal agency uses the nonprocurement debarment and suspension system to exclude from Federal programs persons who are not presently responsible.

* * *

Subpart F – General Principles Relating to Suspension and Debarment Actions

24 C.F.R. §24.600 How do suspensions and debarment actions start?

When we receive information from any source concerning a cause for suspension or debarment, we will promptly report and investigate it. We refer the

question of whether to suspend or debar you to our suspending or debarring official for consideration, if appropriate.

* * *

A.R.S. § 36-1404. Housing authority; employees

A. Every city, town or county, in addition to other powers conferred by this article, may, by proper resolution of its governing body, create as an agent of that city, town or county a housing authority of the city, town or county. The city, town or county may delegate to that authority its power to acquire, own, maintain and dispose of real estate and appurtenances to real estate and to construct, maintain, operate and manage a housing project or projects and, notwithstanding the foregoing enumeration, may delegate to the authority any or all of the powers conferred on the city, town or county by this article, including the power to borrow money, issue bonds and acquire real property through the exercise of eminent domain. However, public housing authorities that act and exist under the control of a city, town or county may exercise eminent domain or issue bonds only on and pursuant to specific, formal case by case project preapproval from the governing body of that city, town or county.

* * *

No. 08-1118

IN THE

Supreme Court of the United States

PATRICIA KONARSKI, ET AL.,

Petitioners,

-vs-

CITY OF TUCSON, ET AL.,

Respondents.

~~~

FRANK KONARSKI, ET AL.,

Petitioners,

-vs-

MARY JEAN RACITI, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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He took our money and deceived us, and passed away.

Others and we strongly believe that some individuals of the City of Tucson, through their bad influence—discrimination, prejudice, hate crimes, frames, extortion, etc.—caused some of the attorneys listed above to take our money and deceive us. That's why we are appealing to the Supreme Court.

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INTRODUCTION

When navigating through City Respondents' ("Respondents") Brief in Opposition, be wary of the manipulations made by Respondents' attorneys, as they have been implicated of wrongdoing herein.

This is based on Respondents' own employee-turned-whistleblower, Inspector Lee Hanley, who has said, in reference to Petitioners' attempts to obtain records, "*Our attorneys' office* ***likes to give you half of them***," and that "*I've been telling the [Respondent] lawyers for years. I've been going, you guys are going to get screwed one of these days because what you're doing is* ***not legal***." Court Reporter Transcript ["CRT"] of Whistleblower Lee Hanley, April 6, 2005, at 18, lines 1-2, and at 23, lines 12-15.[1] (Emphasis added.) Another then-employee-now-whistleblower, Jess Craig, says he received retaliation when he would no longer attack Petitioners: "They [Respondents] definitely put me on the X-list, and I got tormented for it. Tormented." CRT of Whistleblower Jess Craig, April 19, 2005, at 19, lines 9-11. Despite this revelation, Respondents lie to this Court: "[t]here are no 'whistleblowers'..." Resp. Br. in Opp. at 8. Given the above whistleblower excerpts, Respondents' latter quote speaks to their dishonesty.

Another deception in their Brief in Opposition, concerning the Section 8 Case, *Patricia Konarski, et al., v. City of Tucson*: Respondents argue that their *barring* Petitioners Patricia, John F. and Frank E. Konarski—starting from January 2003 when the three petitioners first became rental property

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[1] Whistleblower CRTs are available from the district court or 9th Circuit records.

owners/landlords to today—from fulfilling the low-income housing demand of renting to prospective Section 8 tenants desiring their housing by Respondents' refusal to perform move-in housing inspections of the three petitioners' apartments was neither a "suspension nor a debarment." Resp. Br. in Opp. at 5. Respondents claim they are immune from following Section 8 Housing program considerations promulgated in the Code of Federal Regulations (or "C.F.R.," "C.F.R.s"), particularly 24C.F.R. 24.600, et seq., even though they are *federally paid to administer this federal program*.

Respondents' neither-a-suspension-nor-a-debarment assertion defies logic: If the three petitioners were neither suspended nor debarred, 1) Respondents would not be refusing to conduct their federally-paid function of move-in housing inspections of the three petitioners' rental properties upon prospective Section 8 tenants' submitted intentions to use their federal Section 8 vouchers there; 2) the three petitioners would currently be alleviating the low-income Section 8 housing demands; and, thus, 3) the Section 8 Case would not exist to force Respondents to follow the C.F.R.s.

As to the Whistleblower Case, *Frank Konarski, et al., v. Mary Raciti, et al.*: Respondents argue that all five "Petitioners do not dispute that the Ninth Circuit correctly found that the requirements of res judicata were met." Resp. Br. in Opp. at 3. To the contrary--and another revelation of Respondents' fraud—Petitioners actually have said "the Whistleblower Case did not meet the criteria of *res judicata*." Pet. at 12; *see also id.* at 13,14,15.

More to the point, even if *res judicata* elements were 'met' in the Whistleblower Case, this Court

must consider that given the *clandestine* corruption, *res judicata* should not have been so rigidly applied.

Both the Section 8 Case and the Public Corruption Whistleblower Case exude compelling reasons to be heard by this Court. The Court of Appeals' circuit-defying opinion compounds the difficulty of addressing the "growing shortage of affordable housing"[2] as the opinion effectively denies citizens to hold federally-paid housing authorities accountable to the C.F.R.s amid also the ever-increasing typical national scenario of "millions of dollars [being] unaccounted for and thousands of residents unserved"[3] in the Section 8 Housing program, all the while citizens are without the civil means to combat clandestine corruption—a "cancer on the City." CRT of Whistleblower Lee Hanley, April 6, 2005, at 5, line 10.

Section 8 Case

Despite Respondents' detractions, the crux of the Section 8 Case is this: The Ninth Circuit Court of Appeals ("Court of Appeals") opined, *without authority*, that the C.F.R.s—the essential frameworks of federal programs—particularly 24 C.F.R. 24.760, has no application to any citizen who involves himself in a federal program.

24 C.F.R. 24.700, et seq., affords property

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[2] Eric Sagara, *Cost of Roof Overhead Going Through the....-City, Agencies Seek Affordable Housing Options*, TUCSON CITIZEN, Sept. 15, 2006, at 1A (quoting City Respondent Emily Nottingham).

[3] Jessica Garrison, *A Struggle to Get Housing in Order—The L.A. Agency's Chief Has Discovered Millions of Dollars Unaccounted for and Thousands of Residents Unserved*, LOS ANGELES TIMES, Oct. 21, 2007, http://articles.latimes.com/2007/oct/21/local/me-housing21.

owners—such as Petitioners Patricia, John F. and Frank E. Konarski—a suspension-cause hearing. However, defying other circuit courts, the Court of Appeals took the unprecedented step of adding the unachievable legal prerequisite—obstacle—that property owners first need to show a right to participate in the Section 8 Housing federal program *before* they could enjoy 24 C.F.R. 24.760 protections designated for property owners. Of course, since the Court of Appeals cites to the legal establishment that no property owner has a right to participate in the federal program, the federal regulations intended to protect property owners—i.e., 24 C.F.R. 24.700, et seq.—are rendered fruitless and robbed of their regulatory protection purposes by the Court of Appeals' circuit-differing 'prerequisite' opinion. Respondents cited to <u>no</u> authority to support this opinion. In fact, Respondents undercut this opinion by not denying the protections found in 24 C.F.R. 24.760 are owed to the three petitioners—it is just that Respondents erroneously assert they, themselves, are under no obligation to provide such protections as federally paid administrators for their bar actions. *See* Resp. Br. in Opp. at 5, 15.

Public Corruption Whistleblower Case

The *res judicata* elements were not met, but even if they were—given the "top secret" corruption—the standard was too rigidly applied because Petitioners had only begun to discover damning facts in April 2005 what Respondents had kept secreted away: The conspiracy to destroy Petitioners' interstate commerce business,[4] especially

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[4] A business of multiple units is considered interstate commerce in *United States v. Lopez*, 514 U.S. 549 (1995).

given that whistleblowers revealed that Respondents had acted to "***falsify documents***," including to "change stuff inside the computer," and conduct their corruption in a manner that was "***kept...top secret....behind closed door sessions***," which this Court should take exception to and consider as part of what is today's certain instances that are deemed sufficiently gross to demand a departure from the rigid adherence to the doctrine of *res judicata*. Respectively, CRT of Whistleblower Jess Craig, April 19, 2005, at 19, line 23; CRT of Whistleblower Robert and Brian Hendricks, May 9, 2005, at 20, line 11; and *id.* at 11, lines 4-8. (Emphasis added.)

SECTION 8 CASE: REASONS FOR GRANTING PETITION

I. Respondents *Fail* to Show How the Court of Appeals is Not in Conflict With Other Circuits, and Their Argument That—as Federally Paid Administrative Officials of the Federal Section 8 Housing Program—They Do Not Need to Follow the C.F.R.s is Untenable.

A. As to 24 C.F.R. 24.700, et seq., and Interstate Commerce, the Court of Appeal's Erroneous Opinion Conflicts With the Other Circuit Courts' Opinions.

Respondents claim their "decision in March 2001 to no longer conduct business with Petitioners is neither a suspension nor debarment." Resp. Br. in Opp. at 5. In actuality, Respondents' decision to withhold the three petitioners who make up this Section 8 Case—Petitioners Patricia, John F. and

Frank E. Konarski—were *not* in the business of renting apartments in 2001, much less were they property owners that year.[5]

It was first in 2003 and thereon after, in fact, when, by their refusal to conduct move-in housing inspections, did Respondents bar Petitioners Patricia, John F. and Frank E. Konarski from fulfilling the low-income housing needs of prospective Section 8 tenants who sought their housing of which these three petitioners became the sole owners/landlords in January 2003. Respondents refused to conduct the move-in inspections even though *Respondents, as federally paid administrative officials, are required to do so* of housing owned by property owners who are *not* suspended/disbarred. Refusing to conduct these inspections ended the "free-choice" in the federal free-choice Section 8 Housing program, as prospective Section 8 tenants were *steered away* from their free choice of housing by Respondents—in defiance of "allowing families to choose privately owned rental housing."[6]

After 18 months since January 2003 of being unable to rent, without a hearing under 24 C.F.R. 24.760, to prospective Section 8 tenants who inundated the three petitioners with apartment move-in requests, the three petitioners filed their suit for this C.F.R. violation in 2005.[7]

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[5] Respondents are confused: The March 2001 decision letter *exclusively* addressed Frank J. Konarski (Sr.).

[6] Section 8 Program Description (Respondents federally paid; free-choice tenant housing) is located on the HUD site at http://www.hud.gov/progdesc/voucher.cfm.

[7] The three petitioners' initial suit was filed May 17, 2004; the amendment followed in 2005. Obviously, no lawsuit was filed in 2001 as Respondents' violation of 24 C.F.R. 24.760 had yet to

Though, Respondents futilely cling to the 2001 Title VII employment case of senior Frank J. Konarski.[8] Resp. Br. in Opp. at 2, 5-6, 17. Contrary to Respondents' assertion, since the decision to suspend/debar Frank J. Konarski(Sr.) from the federal program took place in March 2001 and the Title VII employment suit was thereafter filed in the same year, the City of Tucson, as a federally paid Section 8 administrator, had yet to violate the 18-month period of suspension without a hearing, as 18 months had not transpired between the March 2001 letter of denial and the May 2001 Title VII suit.[9]

From this 2001 case, the Court of Appeals applied to this Section 8 Case the legal notion that no property owner has a right to the Section 8 Housing program.

Though, in applying this notion, *the Court of Appeals erred in going a step <u>further</u>* to erroneously state in the instant Section 8 Case—wherein lies the issue before this Court—that Petitioners Patricia, John F. and Frank E. Konarski, and others similarly situated, could not enjoy the protections of 24 C.F.R.

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occur until the 18 months had passed since 2003.

[8] In n.5 of Resp. Br. in Opp. at 6, Respondents fail to note they were sanctioned and admonished often, notably approximately in 1997 and 2001 by HUD, though they cite to their submitted present-day-unvetted fabricated allegations against Frank J. Konarski (Sr.) to the district court to besmirch his good name; now, with the whistleblower revelations of Respondents' fraudulent acts—to "***<u>falsify documents</u>***," "***<u>change stuff inside the computer</u>***"—the district court will need to revisit Respondents' submissions, and cannot be relied upon. CRT of Whistleblower Jess Craig, April 19, 2005, at 19, line 23; CRT of Whistleblower Robert and Brian Hendricks, May 9, 2005, at 20, line 11; and *id.* at 11, lines 4-8.

[9] Frank J. Konarski,Sr. is not even a party to the Section 8Case.

24.760 after 18 months of being barred from renting to prospective Section 8 tenants in need of housing simply because these three petitioners did not have a right to participate in the Section 8 Housing program. A right to the program *is not necessary* for the C.F.R.s to take effect, according to other circuits. Respondents do not controvert this.

The Court of Appeals *opinion lacks authority* to require the three petitioners to exhibit a right to the federal program before being afforded 24 C.F.R. 24.700, et seq. protections. The Court of Appeals opinion also defies other circuits' jurisprudence.

In fact, the 6th Circuit opinion in *Buckeye Terminix Co. v. U.S. Dep't of Housing & Urban Dev.*, 900 F.2d 259 *2 (6th Cir. 1990) that a property owner *does not* need to have a right to a federal program, "*does not* [need to] contract with HUD," but only have a mere business "interest" in qualifying to participate in the program in order to be entitled to the protections of 24 C.F.R. 24.700, et seq., has been left uncontroverted by Respondents. (Emphasis added.) As with the business in *Buckeye*, at bare minimum, the three petitioners were entitled to "a **prompt** post-deprivation hearing" under federal regulations. *Buckeye*, 900 F.2d 259 *13 (Emphasis added.) *See also Housing Study Group v. Kemp*, 739 F. Supp. 633 (D.C. May 16, 1990) (citing *Buckeye, supra*).

Here, the three petitioners—with beyond a mere participation interest—have been engaged with numerous Section 8 voucher holders who have inundated the three petitioners with transaction forms in order to use their federal vouchers at the three petitioners' apartments, yet Respondents—the federally paid administrative 'facilitators'—have had the audacity to ironically interfere with the

facilitation of these voucher holders' housing needs *since January 2003 without any hearing*—interfering with also the federal housing program's purpose of permitting tenants to choose their own housing, and interstate commerce, as "rental property is unquestionably...affecting interstate commerce." *U.S. v. Gomez*, 87 F.3d 1093, 1094 (9th Cir. 1996).

Respondents' response to *Buckeye* does not dispute that 24 C.F.R. 24.700, et seq., affords suspension/debarment protections, but, instead, acts to erroneously say that only HUD has to follow regulations for suspension/debarment, since Respondents believe they operate 'above' 24 C.F.R. 24.700, et seq. Resp. Br. in Opp. at 5, 15. If HUD cannot debar/suspend the three petitioners *without* a hearing, Respondents *cannot either*.

B. Respondents' Argument That They Need Not Follow the C.F.R.s as Federally Paid Administrators is Untenable.

1. Respondents' Argument is Not Properly Brought Before This Court.

The Court of Appeals refused to accept Respondents' repeated argument of not needing to follow the C.F.R.s. Aple.Ans.Br. at 6, 13-15.

If Respondents sought to make this argument an issue, they should have filed a cross-petition.

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2. Even if before this Court, Respondents' Argument of Being Immune to Following the C.F.R.s is Fallacious Because, as Federally Paid Administrators, They Are Bound by 24 C.F.R. 24.700, et seq.

The real issue before this Court is, again, that the Court of Appeals defied the jurisprudence of other circuit courts in creating an obstacle for citizens to apply the protections of 24 C.F.R. 24.700, et seq., and *not* whether Respondents were free to defy 24 C.F.R. 24.700, et seq.

Sims v. Kemp is additional authority that Respondents are bound by 24 C.F.R. 24.700, et seq., as the 7th Circuit *Sims* court opined that "the Housing Act [of 1937] and its accompanying regulations [24 C.F.R. 24.700, et seq.] apply here," including "24 C.F.R. 24.700," when public housing authorities, not only HUD, take actions against an individual—just as such regulations applied when disbarment/suspension actions were taken against a company interested in being qualified to participate in a federal housing program in *Buckeye*—because, similarly, failing to follow the regulations would provide housing authorities, like Respondents, an "end-run around the clear intent of Congress"—the intent of free-choice housing. 781 F. Supp. 1264, 1268 (N.D. Ill. July 11, 1991). In other words, what is important to take from *Sims* and *Buckeye* is that 24 C.F.R. 24.700, et seq., applies to the three petitioners even if a limited denial participation (LDP), suspension or debarment was initiated by a city acting as federally paid Section 8 administrators or HUD.

Respondents misapply *DeRoche v. United States*, 2 Cl.Ct. 809 (1983) and *Eubanks v. United States*, 25 Cl.Ct. 131 (1992) to convey they stand for the premise that Respondents are without the federal authority of HUD to follow 24 C.F.R. 24.700, et seq. Resp. Br. in Opp. at 5. In reality, like *DeRoche*, *Eubank* does not establish this—it just merely states that the U.S. cannot be liable for city acts through the signature of the "Mayor of Topeka" because "the United States is not a named party to a contract...." 25 Cl.Ct. 131, 138. Here, the the U.S. is not sued. Instead, Respondents are sued for their indefinitely suspending the three petitioners.

Eubanks supports Petitioners because it establishes "HUD's imposition of regulations and restrictions on the use of the funds it provided to the Topeka Housing Authority," and, thus, as also a housing authority, Respondents had such regulations imposed on them, including 24 C.F.R. 24.700, et seq. 25 Cl.Ct. 131, 137.

Respondents also claim their barring the three petitioners was "within the discretion contemplated by the United States Housing Act of 1937." Resp. Br. in Opp. at 6. However, discretion is not open-ended: "HUD enters into an Annual Contributions Contract (ACC) with the participating housing authority...[and the] ACC, *inter alia*, **mandates** that the participating housing authority **follow** the federal guidelines in operating the program." *McQueen v. Phila. Hous. Auth.*, No. 02-8941, 2005 U.S. Dist. LEXIS 12058, at *7 (E.D. Penn. June 9, 2005). Respondents' discretion is not *carte blanche* on federal funds.

Though, Respondents' attempts to force the Court of Appeals to rule that they are not obligated

to follow 24 C.F.R. 24.700, et seq., are without consequence, since this is not before this Court as the Court of Appeals *refused* to adopt Respondents' argument. Aple.Ans. Br. at 6, 13-15.

WHISTLEBLOWER CASE: REASONS FOR GRANTING PETITION

II. Respondents *Fail* to Show How the Court of Appeals is Not In Conflict With Other Circuit Courts and This Court Concerning Holding Corrupt Officials Accountable for Their "Top Secret" Corruption Scheme.

A. *Res Judicata* Elements Were Not Met, But Even If They Were, Given the "***Top Secret***" Corruption, *Res Judicata* *Cannot* Be So *Rigidly* Applied.

1. *Res Judicata* Elements Could Not Be Met.

Given Respondents' manipulations in their Opposition at 7-8, here the record is corrected:[10] In 1997, Petitioner Frank J. Konarski(Sr.) suffered a *no-probable-cause* police brutality, as determined by two judges.

Petitioners sued *for* *no-probable-cause* brutality in 1998.[11]

In 2001, Petitioner Frank J. Konarski sued the City *for* a Title VII employment matter out of a 2001

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[10] See also n.6 herein.

[11] The City of Tucson deprived Petitioners of a trial via a technicality dismissal.

city letter addressed solely to him.

Whistleblowers Craig, Hendricks, among others, became employed by Respondents' Department of Neighborhood Resources("DNR") that was created in **2002**. They came **forward as whistleblowers in 2005**.

Logically, *res judicata* does *not* apply: **In 1998 nor in 2001 could Petitioners have sued Respondents for events that did not take place until 2002 and thereafter**.

2. Maintaining *Stare Decisis*: Given "***Top Secret***" Corruption, *Res Judicata* Should *Not* Have Been *Rigidly* Applied.

Petitioners' then-counsel, starting in response to Respondents' motion to dismiss at 12-13, raised this: "In fact, the Supreme Court of the United States held that: '...injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of *res judicata*...." Respondents have not controverted this argument, but have vexatiously accused Petitioners of "fraud" in having incorrectly attributed this latter quote to *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) and that *Hazel-Atlas* is no longer good law. Resp. Br. in Opp. at 3,15.

However, Respondents are wrong in both respects. Without due diligence, Respondents recklessly accuse, since this Court, in 1998, like Petitioners, *also attributed* the foregoing quote that injustices demand "a departure from rigid adherence to the doctrine of res judicata" to *Hazel-Atlas* in *United States v. Beggerly*,524 U.S. 38, 46 (1998). This is still the *stare decisis* of this Court, as found in

Beggerly, and other post-cases.

Whistleblowers reveal that the corruption operations targeting Petitioners were ***"top secret,"*** done ***"behind closed door sessions"*** where Respondents falsified documents, etc., in attempting to ***"put them [Petitioners] out of business."*** CRT of Whistleblower Robert and Brian Hendricks, May 9, 2005, at 20, line 11; at 11, lines 4-8; at 3, lines 17-18,respectively.[12] (Emphasis added.) This is a prime injustice example requiring a "departure from rigid adherence to the doctrine of *res judicata*." *Beggerly*, 524 at 46.

There is scant privity of parties,[13] and given the *surreptitious* efforts of corrupt Respondents that caused information to be withheld from Petitioners and the court until the whistleblower revelations in 2005, the elements of *res judicata* should *not* have been so *rigidly* applied.

CONCLUSION

Given the foregoing, it is prayed for that this Court grant the petition for writ of certiorari.

Others and Petitioners believe Respondents' Brief in Opposition prepared by City Attorneys Michael Rankin and Martha Durkin are the main leaders of the crime ring that commits extortion, corruption, hate crimes, discrimination, frames, etc. Michael Rankin and Martha Durkin, in their brief,

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[12] Petition at 20-21 includes whistleblower revelations of Respondents' use of a court to effect fraud: the fabrication—trumping up of criminal charges to extort money from Petitioners in 2003.

[13] For more information on scant privity, see Petition at 14.

created fabrications—pure lies to camouflage all of Respondents' and their criminal acts that they did with their own conflict of interest, including to terrorize Petitioners for years to steal their properties, businesses, and ruin their good name.

Whenever Petitioners tried to defend themselves, their attorneys were discouraged and threatened. To prove this, please see all the attorneys reflected in the introductory of the Petition and this Reply. Petitioners' attempt to hire a new attorney was met with the same discouragement and threats by City/Respondents. Proving this, Petitioners have affidavits from these attorneys.

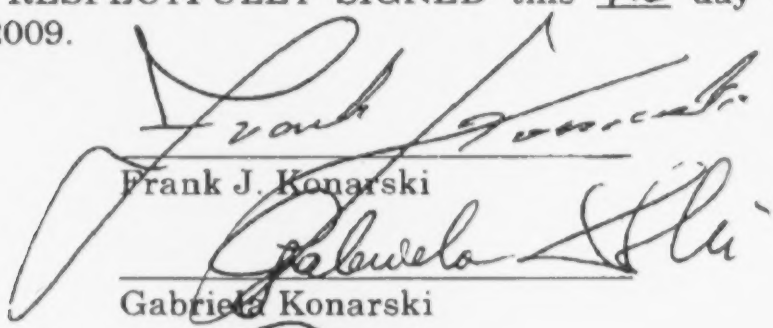
Petitioners also tried contacting the local police, local FBI, and attorney general's office, but they are silent. The local FBI, through Respondents' influences, threatened Petitioners with no reason instead of helping them, claiming they are above God.

Respondents are holding Petitioners' businesses hostage and are deliberately attempting to extort, by proxy, over $800,000.00 from Petitioners through a deliberate frame via homeless people who fraudulently-induced their tenancy at Petitioners' business and violated a crime-free addendum in disturbing Petitioners' complex community, as determined by eviction trial Judge Walter Weber, who rendered an eviction judgment in Petitioners' favor. Despite this, others and Petitioners believe City/Respondents, in retaliation to Petitioners' exposing their corruption, are deliberately using their conflict-of-interest attorney-general friends and scam-artist attorney to extort money from Petitioners and their insurance in attempting to weaken Petitioners.

To prove these facts, see the whistleblower excerpts found here and in the Petition, which come from the transcripts prepared by a court reporter present with an attorney conducting whistleblower interviews. Immediately after these transcripts were released to Respondents/City, the court reporter was found dead; others and Petitioners believe this happened because of the public corruption whistleblower case.

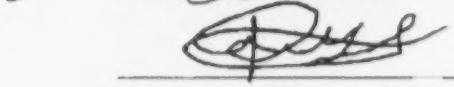
Please hear Petitioners' cases.

RESPECTFULLY SIGNED this 12 day of May 2009.



Frank J. Konarski

Gabriela Konarski



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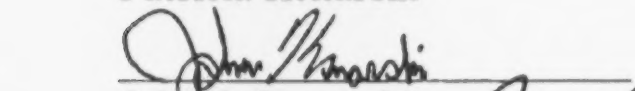
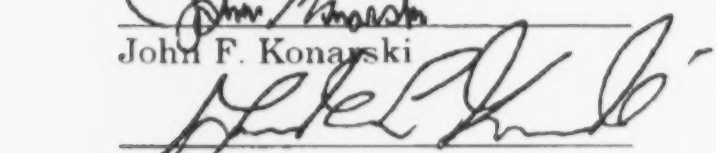


John F. Konarski



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Robert Hooker, Esq.
One Way or Another Involved In or Aware of the Case
He took our money and deceived us, and passed away.

130

(4)

No. 08-1118

IN THE

Supreme Court of the United States

PATRICIA KONARSKI, ET AL.,

Petitioners,

-vs-

CITY OF TUCSON, ET AL.,

Respondents.

~~~

FRANK KONARSKI, ET AL.,

Petitioners,

-vs-

MARY JEAN RACITI, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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He took our money and deceived us, and passed away.

Others and we strongly believe that some individuals of the City of Tucson, through their bad influence—discrimination, prejudice, hate crimes, frames, extortion, etc.—caused some of the attorneys listed above to take our money and deceive us. That's why we are appealing to the Supreme Court.

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PETITION FOR REHEARING

On May 18, 2009, this Court denied Petitioners' petition for writ of certiorari.

Per Rule 44.2, Petitioners respectfully petition this Court for rehearing of the matters of 1) the Section 8 Case, *Patricia Konarski, et al., v. City of Tucson*, and 2) the Public Corruption Whistleblower Case, *Frank Konarski, et al., v. Mary Raciti, et al.*

Section 8 Case: Substantial Grounds for Rehearing

The Section 8 Case concerns an ever-increasingly national dilemma that, without this Court's intervention, will continue to progressively cause multi-faceted adverse effects upon society: As it is, the "growing shortage of affordable housing"[1,2] makes it extremely difficult to meet the increasing housing demands of low-income Section 8 tenants, who—with federal Section 8 Housing vouchers in hand—are consequently often left "unserved"[3] without adequate housing, and such a dilemma is further compounded by Respondents, federally-paid

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[1] Eric Sagara, *Cost of Roof Overhead Going Through the....-City, Agencies Seek Affordable Housing Options*, TUCSON CITIZEN, Sept. 15, 2006, at 1A (quoting City Respondent Emily Nottingham).

[2] *See also* NATIONAL LOW INCOME HOUSING COALITION. 2009. *Out of Reach 2007-2008: Persistent Problems, New Challenges for Renters.*

[3] Jessica Garrison, *A Struggle to Get Housing in Order—The L.A. Agency's Chief Has Discovered Millions of Dollars Unaccounted for and Thousands of Residents Unserved*, LOS ANGELES TIMES, Oct. 21, 2007, http://articles.latimes.com/2007/oct/21/local/me-housing21.

Section 8 administrators, who have hampered—defied the Code of Federal Regulations (alternatively, "C.F.R.s" or "C.F.R.") intended to provide a framework for the federal Section 8 Housing program that provides a private solution to the dilemma in the form of encouraging privately developed affordable housing developments to alleviate such serious affordable housing deficiencies.

Given the current national economic crisis, in fact, since the filing of their briefs with this Court, Petitioners Patricia, John F. and Frank E. Konarski have received an elevated influx of Section 8 recipient move-in requests from local families to families moving from across the country who are in need of affordable housing and have made clear their desire to use their "free-choice" Section 8 Housing federal vouchers at the three petitioners' apartments.

However, in violation of the Section 8 Housing federal program considerations promulgated in the Code of Federal Regulations, particularly 24 C.F.R. 24.600, et seq., including 24 C.F.R. 24.760, Respondents have indefinitely suspended the three petitioners for more than 18 months without cause since 2003 when they first became apartment property owners from fulfilling these free-choice move-in housing requests of federal voucher holders by Respondents' refusing to perform their federally-paid function of conducting move-in housing inspections of the three petitioners' apartments, all *without* providing to Petitioners any sort of a C.F.R.-required hearing.

24 C.F.R. 24.760 requires a hearing to be held, among other procedural processes to take place, for a property owner who is suspended for more than 18 months from the program. As such, courts of

different circuits across the nation have determined that with such federal regulations come due process protections; however, the Ninth Circuit has disagreed in the Section 8 Case.

Specifically, after oral argument on August 13, 2008, the Ninth Circuit affirmed the dismissal of the Section 8 Case of Petitioners Patricia, John F. and Frank E. Konarski by relying on a legal ruling of another case—i.e., there is no independent right to participate in the Section 8 Housing program—as a basis upon which to then erroneously determine, in contravention of the jurisprudence of other circuit courts across the nation, that the Code of Federal Regulations, including particularly 24 C.F.R. 24.610, et seq., does not afford such three Petitioners or others similarly seeking participation in a federally regulated program any due process protections, including a suspension-cause hearing, to wit: "[Petitioners Patricia, John F. and Frank E. Konarski] assert[ed] that they could only be suspended from Section 8 program for 18 months **is dependent upon their having a right to participate in the program....**" Pet. for Cert. App. 4. (Emphasis added.)

Petitioners Patricia, John F. and Frank E. Konarski have argued—with authority from other circuit courts—that whether they have a "right" to Section 8 or not does not have any relevance as to whether the Code of Federal Regulations applies to them.

This Court must reverse the Ninth Circuit's opinion in order to preserve the means to have the Section 8 Housing program function as intended by the United States Congress so that deviant federally-paid administrators of the Section 8 Housing

program, who operate contrary to established federal regulations, can be held accountable for their actions by citizens such as Petitioners Patricia, John F. and Frank E. Konarski.

This Court's action to vacate the aforesaid Ninth Circuit's circuit-dividing opinion is critically necessary especially at a time when officials of the National Multi-Housing Council and National Apartment Association recently testified before the United States Congress about the affordable housing shortage crisis, underscoring that there is no room for Section 8 Housing Administrators, like Respondents, to deviate from the C.F.R.s in light of the fact that the Section 8 Housing program is the "federal government's primary involvement in the provision of affordable housing," only second to a federal tax relief program, and that "[r]ental housing has to become a higher priority if we are going to solve the affordable housing shortage," testified a housing official.[4] Though, this shortage cannot be solved if the Section 8 Housing program remains "troubled," especially as the full legal interpretation and effect of its regulatory framework remains unsettled among the Ninth Circuit and other circuits as to whether citizens can apply such federal regulations afforded them to hold federally-paid Section 8 administrators, such as Respondents, accountable to the free-choice housing federal mission and the legitimate administration of such a

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[4] Jim Arbury, Senior Vice President, Government Affairs National Multi Housing Council / National Apartment Association, Statement and Testimony Before U.S. Congress, Committee on House Financial Services, CQ CONGRESSIONAL TESTIMONY, CONGRESSIONAL QUARTERLY, INC., 2009.

program.[5]

Clearly, the Ninth Circuit's opinion of one's needing a *prerequisite* right to apply the Code of Federal Regulations is in conflict with various other appeals courts of different circuits. In fact, contrary to the Ninth Circuit's opinion, the Fifth Circuit has actually applied 24 C.F.R. 24.700 to the "due process" found within the Code of Federal Regulations to property owners the government sought to suspend. *See Rogers v. United States,* 187 F. Supp.2d 626, 632 (N.D. Miss. 2001); affirmed by this Court in *Rogers v. United States/Human Urban Dev.*, 58 Fed. Appx. 595 (US 2003) (without published opinion).

In addition to the Fifth Circuit conflict, the Sixth Circuit found, in *Buckeye Terminix Co. v. U.S. Dep't of Housing & Urban Dev.*, 900 F.2d 259 *2 (6th Cir. 1990), that a business that did not have a contract with the U.S. Department of Housing and Urban Development or its public housing authorities, but *merely* an "interest in" being qualified for participation in a federal housing program, was legally afforded "a right to be represented by counsel and present all relevant evidence at a hearing" under the 24 C.F.R. 24.700, et seq. Yet, in the case of Petitioners Patricia, John F. and Frank E. Konarski, *sub judice*—in which not only do Petitioners have a business interest in participating in the Section 8 Housing program, they also have been engaged with numerous Section 8 voucher holders who have inundated the three petitioners with transaction

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[5] Section 8 Program Description (Respondents federally paid; free-choice tenant housing) is located on the HUD site at http://www.hud.gov/progdesc/voucher.cfm (free-choice housing by Section 8 tenant).

forms in order to use their federal vouchers at the three petitioners' apartments, consequently making the three petitioners' privilege to participate in the program a right to accept the business they receive—they have been denied all due process protections accorded under 24 C.F.R. 24.700, et seq., including a hearing, to the present day—now approximately seven years, even though "a **prompt** post-deprivation hearing" should have been accorded them at the very least. *Buckeye*, 900 F.2d 259 *13 (Emphasis added.) *See also Housing Study Group v. Kemp*, 739 F. Supp. 633 (D.C. May 16, 1990) (citing *Buckeye, supra*). *See also Sims v. Kemp,* 781 F. Supp. 1264 (N.D. Ill. July 11, 1991) (citing C.F.R.s, including 24 C.F.R. 24.700, et seq., apply to the limited denial, suspension and debarment actions by a housing authority).

This is where the injustice lies: If Section 8 participation is determined by the Section 8 voucher holder, and Respondents' role is to ensure safe and sanitary living conditions to those qualified under the Section 8 Housing program by performing their federally-paid function of processing Section 8 voucher holders' move-in requests at the three petitioners' apartments, where is the government's—in this case Respondents'—authority to suspend the application of the Code of Federal Regulations as it pertains to any property owner in Southern Arizona or any other locality? Quite bluntly, this authority does not exist.

Put differently, since the Section 8 voucher recipient determines where they live—what housing of a property owner they want, the Respondents' job is to administer this program by: (1) ensuring that the property is safe and secure by performing move-

in inspections; and (2) making sure that the property owner gets compensated. Instead, Respondents' refusal to conduct these inspections has ended the "free-choice" in the federal free-choice Section 8 Housing program, as prospective Section 8 tenants have been *steered away* from their free choice of housing by Respondents—in defiance of "allowing families to choose privately owned rental housing."[6] Effectively, Respondents have violated the core mission of the federal housing program and interfered with interstate commerce in the process,[7] putting a further strain on low-income housing families by prohibitively restricting their choice of housing—housing of which is already too scarce to begin with, all in defiance of the C.F.R.s and without cause. Furthermore, in failing to follow these federal regulations, particularly 24 C.F.R. 24.700, et seq., Respondents have orchestrated—and the Ninth Circuit's circuit-defying opinion, as it stands, has allowed to persist—an unorthodox "end-run around the clear intent of Congress"—the intent of free-choice housing. *Sims*, 781 F. Supp. 1264, 1268 (N.D. Ill. July 11, 1991).

If the Code of Federal Regulations were to only be applied to property owners who have a "right" to Section 8, and in consideration of the Ninth Circuits' establishment that no property owner actually has the "right" to Section 8, then, logically, the Code would protect no property holder, rendering such a

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[6] Section 8 Program Description (Respondents federally paid; free-choice tenant housing) is located on the HUD site at http://www.hud.gov/progdesc/voucher.cfm.

[7] *U.S. v. Gomez*, 87 F.3d 1093, 1094 (9th Cir. 1996) ("rental property is unquestionably...affecting interstate commerce.")

code impotent as to its regulatory purpose and useless as to its existence.

Therefore, the Ninth Circuit's opinion defies the jurisprudence of other circuit courts, the Congress's free-choice housing intent, and also logic.

Clearly, 24 C.F.R. 24.700, et seq., does apply to Petitioners Patricia, John F. and Frank E. Konarski, and they are owed procedural due process, including a hearing, so that the three petitioners may fulfill Section 8 Housing recipients' choice of using their housing vouchers at the three petitioners' apartments without being met by highly inappropriate *steer* tactics from Respondents, and so that the federal Section 8 Housing program overall can be administered legitimately in order to alleviate the affordable housing shortage.

Public Corruption Whistleblower Case: Substantial Grounds for Rehearing

The Whistleblower Case involves the revelation of an extraordinary *clandestine* public corruption scheme: City of Tucson employees employed as of 2002 and on came forward in 2005 to admit, as whistleblowers, that they were ordered by high-directorate Respondents to harm Petitioners Frank J., Gabriela, Patricia, John F. and Frank E. Konarski and their business through a systematic and methodical public corruption campaign to run them out of business. This includes the following: falsifying police reports and charges in 2002 and the subsequent extortion of money; pursuing frivolous and vexatious requirements of Petitioners to progressively hinder the management and commerce of their business; attempting to deprive Petitioners'

use of their property; and utilizing inspectors of the Department of Neighborhood Resources to hinder Petitioners' profession and systematically rob them of their real estate and livelihood. The Ninth Circuit's Opinion is devoid of the foregoing description of the nature of this egregious public corruption matter.

Respondents had the District Court dismiss the Whistleblower Case on *res judicata*, which the Ninth Circuit upheld after oral arguments, despite the maintained fact that the Whistleblower Case did not meet the *res judicata* criteria.

The crux of the appeal issue before this Court is that even if, *assuming arguendo,* the rigid form of *res judicata* did, in fact, bar the Whistleblower Case, as the District Court and Ninth Circuit believed it did, it was not proper for the Ninth Circuit to have affirmed such a dismissal of the Whistleblower Case instead of allowing it to be remanded to meet the justice-wielding body of a jury because said case arose out of noteworthy egregious injustices Petitioners have suffered as a result of a whistleblower-revealed extraordinarily methodical and systematic public corruption scheme aimed at destroying a family and their business that should be considered as part of what is today's "certain instances that are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of *res judicata.*" Petitioners' Response to Respondents' motion to dismiss, at pages 12-13, filed on December 8, 2006, citing, inter alia, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944).[8] *See also Charter Twp. of Muskegon v. City of*

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[8] *United States v. Beggerly*, 524 U.S. 38, 46 (1998) internally

Muskegon, 303 F.3d 755, 762 (6th Cir. 2002).

Whistleblowers reveal that the corruption operations targeting Petitioners were ***"top secret,"*** done ***"behind closed door sessions"*** where Respondents—with the use of unlimited public funds and resources—falsified documents, etc., in attempting to ***"put them [Petitioners] out of business."*** Court Reporter Transcript of Whistleblower Robert and Brian Hendricks, May 9, 2005, at 20, line 11; at 11, lines 4-8; at 3, lines 17-18, respectively.[9] (Emphasis added.) This is a prime injustice example requiring a "departure from rigid adherence to the doctrine of *res judicata*." *United States v. Beggerly*, 524 U.S. 38, 46 (1998).

There is scant privity of parties,[10] and given the *surreptitious* efforts of corrupt Respondents that caused information to be withheld from Petitioners and the court until the whistleblower revelations in 2005, the elements of *res judicata* should *not* have been so *rigidly* applied.

The Ninth Circuit's Opinion is at odds in affirming the District Court's ruling of *res judicata* in the Whistleblower Case: Empirically, it is not legally possible for the District Court nor Ninth Circuit to consider a 1998 cause of action of a no-probable-cause "police brutality," and a 2002 cause of action for fabricating bogus charges and other tortious conduct as one in the same for the purpose of *res*

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cites *Hazel* as the original source of the latter quote.

[9] Petition for Writ of Certiorari at 20-21 includes whistleblower revelations of Respondents' use of a court to effect fraud: the fabrication—trumping up of criminal charges to extort money from Petitioners in 2003.

[10] For more information on scant privity, see Petition for Writ of Certiorari at 14.

judicata; it simply cannot be reconciled that the two are the same action under the same litigation.

Instead of distinguishing the Whistleblower Case apart from the incident just prior to 1998, the Ninth Circuit incorrectly implies that it is based "as a result of the incident." Pet. for Cert. App. 2. The Ninth Circuit's Opinion mistakenly goes out further on a limb to make an all-inclusive disposition that while the claims of the Whistleblower Case "are not directly controlled by the prior judgment holding that they have no right to participate in the Section 8 program, the claims are barred because they could have been raised in the prior action." *Id.* at 4. Petitioners retort: How could the Whistleblower Case claims be raised in the prior action of 1998 or 2001 if the Whistleblower Case is based on misconduct discovered in 2005 based on a cause of action alleged in 2002, more than four years later than the 1998 action and a year later than the 2001 action? Reading the foregoing excerpts of the Opinion makes one realize that the Ninth Circuit erroneously did not appreciate the critical knowledge of what the Whistleblower Case actually entails because nowhere in the 4-page Opinion does the Ninth Circuit refer to the post-2001 misconduct.

It is in the light that this Court should consider the Whistleblower Case as one of today's instances in which justice requires that the Court "depart[ ]" from the "rigid adherence to the doctrine of *res judicata*" so that the case can moved forward. *United States v. Beggerly*,524 U.S. 38, 46 (1998) (*citing Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)). The District Court and Ninth Circuit failed to provide such relief.

The damning transcribed admissions of the

whistleblowers' egregious systematic and methodical orders made by high-directorate Respondents to attack Petitioners (Konarskis) and their business that make up the claims of the Whistleblower Case provide an alarming glimpse of the public corruption Petitioners had to endure, including the following:

Whistleblower: They [city officials] have had logistical meetings to specifically go after who they want. (Court Reporter Transcript of Whistleblower Lee Ray Hanley, April 6, 2005, at 27, lines 11-12; available in court records or upon request to Petitioners.)

Whistleblower: What they wanted to do was put them (Konarski) out of business. (Court Reporter Transcript of Whistleblower Robert and Brian Hendricks, May 9, 2005, at 3, lines 17-18; available in court records or upon request to Petitioners.)

Whistleblower: These people [city officials] are bad.... I do know he [city official] tried to condemn some property that your dad [Frank J. Konarski] now owns....And his idea was that he was going to take the property. (Court Reporter Transcript of Whistleblower Lee Ray Hanley, April 6, 2005, at 7, line 1, lines 12-14, lines 18-19; available in court records or upon

request to Petitioners.)

Whistleblower: I used to work for Ceci Cruz and Rick Saldate [city officials], and they would send us out there on occasion to harass them [Konarskis]. (Court Reporter Transcript of Whistleblowers Robert and Brian Hendricks, May 9, 2005, at 3, lines 10-12; available in court records or upon request to Petitioners.)

Whistleblower: Rick Saldate and Cecilia Cruz [city officials] are aware that what they're asking for is illegal, but they're also aware that most people won't fight. They go after the poor people first. (Court Reporter Transcript of Whistleblower Lee Ray Hanley, April 6, 2005, at 12, lines 21-24; available in court records or upon request to Petitioners.)

Whistleblower: The Konarskis was one of their main targets. (Court Reporter Transcript of Whistleblowers Robert and Brian Hendricks, May 9, 2005, at 4, lines 6-7; available in court records or upon request to Petitioners.)

Whistleblower: They just had a personal vendetta against them [Konarski], it seemed to me.

/..../
I know that Rick and his father [city officials] own a lot of rental properties, maybe they were trying to get it...I just know they had a personal vendetta against the Konarskis. (Court Reporter Transcript of Whistleblowers Robert and Brian Hendricks, May 9, 2005, at 6, lines 1-2 and lines 8-11; available in court records or upon request to Petitioners.)

Whistleblower: They [city officials] were forcing me to do things I didn't want. (Court Reporter Transcript of Whistleblowers Robert and Brian Hendricks, May 9, 2005, at 14, lines 23-24; available in court records or upon request to Petitioners.)

Interviewer: Okay. Did he [Frank J. Konarski] ever touch you?

Whistleblower: No, he never touched me....
/..../

Whistleblower: I didn't want to pursue any charges, and they chased me down for a good two weeks. 'You've got to do this. You've got to do this....
....She [Cecilia Cruz, city official] pushed the hell out of that shit. She even escorted me to the City

Attorney's Office. She helped me – she didn't help me – she prepared everything.

/..../

'This is what you've got to tie in. This is what we want to do.' Blah, blah, blah. I felt bad. Then one day, I'm getting a phone call that says, 'Jess, will you drop these charges? We're going to give you 500 bucks.' If I can make this guy go away, and get rid of Ceci, I'll take 50 dollars, I told him. (Court Reporter Transcript of Whistleblower Jess Craig, April 19, 2005, at 13, lines 5-7; at 16, lines 10-12, 20-23; at 17, lines 1-6; available in court records or upon request to Petitioners.)

Whistleblower: They [city officials] would go into the computer and they would change—they would change stuff inside the computer.

/..../

...[T]hey would go in there and change our stuff to make it—to benefit their fitting. (Court Reporter Transcript of Whistleblowers Robert and Brian Hendricks, May 9, 2005, at 20, lines 9-11 and 17-18; available in court records or upon request to Petitioners.)

Interviewer: Were the Konarskis one of those people on that list?

Whistleblower: The Konarskis were one of those people. I was also told by one of the inspectors that they sat outside one of Mr. Konarski's properties yelling at the person inside that he was a wimp, or a pussy, and that he needed to get out there....(Court Reporter Transcript ofWhistleblower Lee Ray Hanley, April 14, 2005, at 15, lines 12-18; available in court records or upon request to Petitioners.)

Whistleblower: They [city officials] wanted to hit Frank harder. Harder. (Court Reporter Transcript of Whistleblower Jess Craig, April 19, 2005, at 6, lines 20-21; available in court records or upon request to Petitioners.)

Whistleblower: You have to write up things, contort, twist. (Court Reporter Transcript of Whistleblower Jess Craig,April 19,2005,at 9, line10; available in court records or upon request to Petitioners.)

Whistleblower: I've been telling the [City] lawyers for years. I've been going, you guys are going to get

> screwed one of these days because what you're doing is not legal. (Court Reporter Transcript of Whistleblower Lee Ray Hanley, April 6, 2005, at 23, line 1, lines 12-15; available in court records or upon request to Petitioners.)

Given the above, contrary to the Opinion, "the City of Tucson's decision not to enter into...contracts" is shown as not being the basis of the Whistleblower Case, to say the least. Pet. for Cert. App. 2.

It would be "manifestly unconscionable" for the corrupt Respondents to be able to escape accountability for their gross tortious and criminal actions against Petitioners by this Court's maintaining the rigid *res-judicata* bar merely because Respondents were able to utilize government resources to conceal their corrupt activities. *Hazel-Atlas Glass Co., supra* (citing *Pickford v. Talbott*, 225 U.S. 651, 657 (1912)).

The Section 8 Case and Whistleblower Case are deserving of this Court's review, as they involve Respondents' continuing misconduct and significant questions "persist and [are] agitated by [such] continuing activities." *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968).

CONCLUSION

Given the foregoing, it is respectfully requested that this Court grant the instant petition for rehearing and hear this matter.

Others and Petitioners believe Respondents'

Brief in Opposition prepared by City Attorneys Michael Rankin and Martha Durkin are the main leaders of the crime ring that commits extortion, corruption, hate crimes, discrimination, frames, etc. Michael Rankin and Martha Durkin, in their brief, created fabrications—pure lies to camouflage all of Respondents' and their criminal acts that they did with their own conflict of interest, including to terrorize Petitioners for years to steal their properties, businesses, and ruin their good name.

Whenever Petitioners tried to defend themselves, their attorneys were discouraged and threatened. To prove this, please see all the attorneys reflected in the introductory of the Petition and this Reply. Petitioners' attempt to hire a new attorney was met with the same discouragement and threats by City/Respondents. Proving this, Petitioners have affidavits from these attorneys.

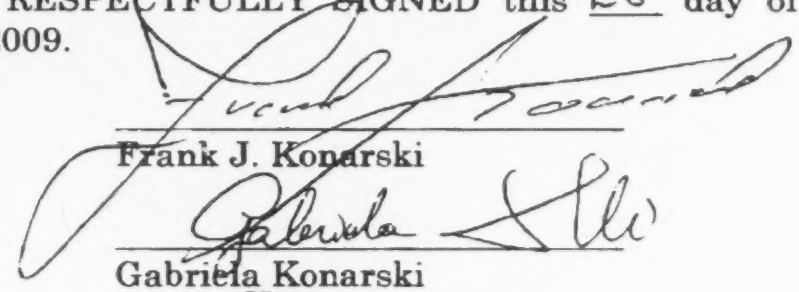
Petitioners also tried contacting the local police, local FBI, and attorney general's office, but they are silent. The local FBI, through Respondents' influences, threatened Petitioners with no reason instead of helping them, claiming they are above God.

Respondents are holding Petitioners' businesses hostage and are deliberately attempting to extort, by proxy, over $800,000.00 from Petitioners through a deliberate frame via homeless people who fraudulently-induced their tenancy at Petitioners' business and violated a crime-free addendum in disturbing Petitioners' complex community, as determined by eviction trial Judge Walter Weber, who rendered an eviction judgment in Petitioners' favor. Despite this, others and Petitioners believe City/Respondents, in retaliation to Petitioners'

exposing their corruption, are deliberately using their conflict-of-interest attorney-general friends and scam-artist attorney to extort money from Petitioners and their insurance in attempting to weaken Petitioners.

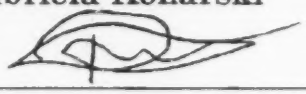
To prove these facts, see the whistleblower excerpts found here and in the Petition, which come from the transcripts prepared by a court reporter present with an attorney conducting whistleblower interviews. Immediately after these transcripts were released to Respondents/City, the court reporter was found dead; others and Petitioners believe this happened because of the public corruption whistleblower case.

RESPECTFULLY SIGNED this 28 day of May 2009.

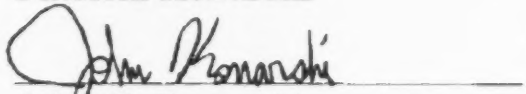


Frank J. Konarski

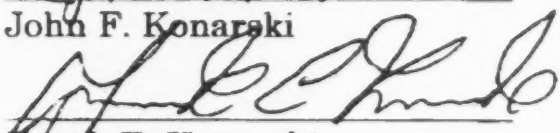
Gabriela Konarski



Patricia Konarski



John F. Konarski



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He took our money and deceived us, and passed away.

CERTIFICATION OF GOOD FAITH

The Petitioners certify, as *pro se* individuals to the best of their abilities, that this Petition for Rehearing is brought in good faith and not interposed for the purpose of delay.

This 28 day of May 2009.

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